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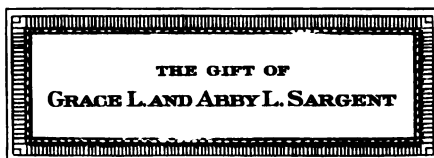
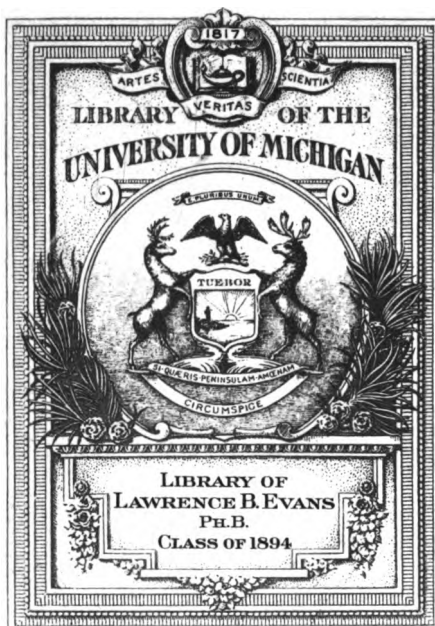
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# COMPARATIVE ADMINISTRATIVE LAW

AN ANALYSIS OF THE ADMINISTRATIVE SYSTEMS  
NATIONAL AND LOCAL, OF THE UNITED  
STATES, ENGLAND, FRANCE  
AND GERMANY

BY

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# BOOK IV.

## THE LAW OF OFFICERS.

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### CHAPTER I.

#### OFFICES AND OFFICERS.

##### *I.—Definition.*

1. *In general.*—By an office is understood a right or duty conferred or imposed by law on a person or several persons to act in the execution and application of the law.<sup>1</sup> By officers are meant those persons on whom an office has been conferred or imposed. The word authority is also sometimes used to designate the person or persons holding an office. It is to be noticed that an office may exist without the officer. Thus we often hear of an office being vacant. On the other hand there may be an officer who has no office. Thus an officer who has been pensioned or retired and who is not discharging official functions may be subjected to many of the duties resulting from the existence of the official relation. This is particularly true of Germany.<sup>2</sup>

<sup>1</sup> Stengel, *Lehrbuch des Deutschen Verwaltungsrecht*, 158; Mechem, *Law of Public Offices and Officers*, 1.

<sup>2</sup> *Supra*, I., p. 94.



2. *Distinction between office and employment.*—The conceptions of office and officer are conceptions of public and not of private law. The government may, however, enter into private legal relations as a result of which it may have employees as well as officers. It therefore becomes necessary to distinguish as far as may be an officer from an employee. It has been said that the term office “embraces the idea of tenure, duration, emolument, and duties.”<sup>1</sup> It is not, however, necessary in order that a position under the government be an office that it have all of these characteristics. Thus it seems certain that the idea of emolument is not at all necessary to the conception of an office.<sup>2</sup> There are numerous positions which are offices and to which no salary or emolument of any sort is attached. But it does seem to be necessary, in order that a governmental position be an office, that it possess more than one of the characteristics mentioned. The mere fact that a position is under the government and concerns the public will not constitute it an office; it may be an employment. Thus one who receives no certificate of appointment, takes no oath, has no term or tenure of office, discharges no duties and exercises no powers conferred upon him directly by law, but simply performs such duties as are required of him by the persons employing him and whose responsibility is limited to them, is not an officer, and does not hold an office, although he is employed by public officers and is engaged about public work.<sup>3</sup> Applying these principles, deputies not obliged to take the oath required

<sup>1</sup> *United States v. Hartwell*, 6 Wallace, 385.

<sup>2</sup> See *State v. Stanley*, 66 N. C., 59.

<sup>3</sup> *Olmstead v. the Mayor, etc.*, 42 N. Y. Super., Ct. 487.

of officers, and not provided for by law, have been held to be mere agents or employees of their principals who may be officers.<sup>1</sup> But deputies provided for by law with fixed powers and duties and giving bonds in accordance with the law are officers, *e. g.* deputy post-masters, marshals, and sheriffs.<sup>2</sup> While there are other *criteria* which may be of use in distinguishing an office from an employment, the most important canon of distinction is that, while an employment may be created by contract as a result of the fact that the government may be in some cases a subject of private law, an office can never be created by contract, but finds its source and its limitations in some act of governmental power. Thus where the legislature created by an act of legislation the position of public printer the court held that such position was an office and that the public printer was an officer and therefore might not assign the position<sup>3</sup>; but on the other hand where the legislature provided that the public printing was to be "contracted for," the court held that the public printer was a contractor and not an officer.<sup>4</sup> It will be noticed from these cases that the conception of an office does not depend in any way upon the character of the duties to be performed. It makes no difference whether these duties carry with them the power of compulsion or not, or whether or not the holder of the office is permanently occupied in

<sup>1</sup> *Kavanaugh v. State*, 41 Ala., 399; see also *U. S. v. Smith*, 124 U. S., 525; *Throop v. Langdon*, 40 Mich., 673; and note on page 180 of 72 American Decisions.

<sup>2</sup> *Dunlop v. Munroe*, 7 Cranch, 242; *U. S. v. Martin*, 17 Fed. Rep., 150; *Eastman v. Curtis*, 4 Vt., 616.

<sup>3</sup> *Ellis v. State*, 4 Ind., 1.

<sup>4</sup> *Brown v. Turner*, 70 N. C., 93; see also *Detroit Free Press Co. v. State Auditors*, 47 Mich., 135.

the discharge of his duties, or whether or not the duties are discretionary.<sup>1</sup> All that seems to be necessary is that the duties discharged be discharged in the interest of the government, and that the right to discharge them be based on some provision of law and not upon a contract.<sup>2</sup> The duties themselves may be quite similar to or even identical in character with the duties discharged by private persons. Thus a clerk in an executive department of the United States or of the commonwealths may be an officer.<sup>3</sup> It has been held that even a sailmaker appointed under a warrant under the hand of the secretary of the navy and the seal of the department was an officer. In many cases it is exceedingly difficult to distinguish between an officer and an employee, the reason being that the courts in their decisions have been influenced by some peculiar statutory provision. Thus where statutes have imposed criminal penalties on "officers" for the violation of their duties the courts often give a much narrower construction to the word officer than they do in other cases. Take *e. g.* the case of *United States v. Germaine*.<sup>4</sup> Here the court lays down the rule that only those persons in the service of the national government are officers who are appointed by the President, the head of a department, or the courts, and that all persons not so appointed are mere employees to whom the rules affecting the official relation do not apply.<sup>5</sup> This rule is not, however, to be reconciled

<sup>1</sup> *State v. Salle*, 41 Mo., 31; *Carth*, 479.

<sup>2</sup> *State v. Stanley*, 66 N. C., 59.

<sup>3</sup> *Ex parte Smith*, 2 Cranch, C. C., 693; *U. S. v. Hartwell*, 6 Wallace, 385; *Vaughn v. English*, 8 Cal., 39.

<sup>4</sup> 99 U. S., 508.

<sup>5</sup> See also for an example of the influence which peculiar statutes have upon the decisions of the courts the cases of *United States v. Mouat*, 124 U. S., 303;

with some of the other decisions of the Supreme Court as *e. g.* that of *United States v. Hartwell*,<sup>1</sup> which holds that a person whose appointment though not made by a head of a department has been approved by him, is an officer.<sup>2</sup> Finally it is to be noticed that the definition that has been given of the terms office and officer does not regard as officers those persons who discharge in the main what are called legislative functions, *i. e.* those persons who are members of the legislature both national and commonwealth. This is in accordance with the rule laid down by the Senate of the United States acting as a court of impeachment. In 1799 it decided that a senator was not a civil officer of the United States because he was a member of the legislature.<sup>3</sup> But it is to be noticed also that the action of the Senate on this point is not altogether consistent inasmuch as in January, 1864, it decided that an oath prescribed for civil officers by the act of July 2, 1862, must be taken by senators also<sup>4</sup>; and that the decisions of several of the courts would seem to hold that for the purpose of disqualifying for office the position of member of the legislature both national and commonwealth is an office.<sup>5</sup>

*United States v. Hendee*, *Ibid.*, 309, which hold that a paymaster's clerk who was not appointed by the head of the department and whose position was not provided for by law is not an officer for the purpose of mileage, but is one for the purpose of longevity pay; and also the case of *Ex parte Reed*, 100 U. S., 13.

<sup>1</sup> *Supra*, II., p. 2.

<sup>2</sup> For the decisions of the courts as to the various positions under the government both national and commonwealth, see Mechem, *Law of Offices and Officers*, 12 *et seq.*

<sup>3</sup> See Blount's Trial.

<sup>4</sup> *Cyclopædia of Political Science, etc.*, *sub verbo* impeachment, II., 481.

<sup>5</sup> *People v. Common Council*, 77 N. Y., 503; see also *Morrel v. Haines*, 2 N. H., 246; but see *Wortley v. Barrett*, 63 N. C., 199, 201.

II.—*Methods of organizing offices.*

Official authorities differ in the way in which they are organized. Thus an authority may consist of one person or of more than one person. In the first place while one person may not do all the work of the office, while he may be assisted in the performance of his duties by many subordinates and deputies who in their turn may be officers, still all the actions of the office are to be done under his direction and on his responsibility. A system of offices founded on this principle may be called a single-headed system.<sup>1</sup> In the second plan of organizing an official authority the office is held by more than one person, by several persons who exercise their powers and perform their duties by means of resolutions of the entire body. In the making of these resolutions each one of the holders of the office has legally as much influence as any of the others with perhaps the exception of the president of the board, who may have the right of giving the casting vote in case of a tie vote.<sup>2</sup> A system in which the official authorities are organized as boards is called the collegial or board system. Each of these plans of organizing offices has its advantages and disadvantages. The single-headed system is well fitted for the discharge of duties which require energy and rapidity of action and for which it is advisable to have a fixed and well-defined responsibility; while the board system may be adopted with advantage in all those branches of administration in which carefulness of deliberation,

<sup>1</sup> The Germans call such a system a bureaucratic system, while the equivalent French term is *système unitaire*.

<sup>2</sup> See for the rules of law in the United States in regard to boards, Mechem, *op. cit.*, secs. 571-81.

regard for all sides of the case and impartial decision are particularly desired. Boards are therefore specially suited for the consideration of those matters in which a controversy between individuals involving a question of law is to be decided, *i. e.* for judicial authorities, while the single-headed system is usually the best for purely executive and administrative matters. It is, however, to be noticed that for many administrative matters the board system is to be preferred for the reasons already stated. This is particularly true of the case of the assessment of property for the purposes of taxation. For these reasons we find that seldom does any system of administrative organization adopt either one of these methods of official constitution to the exclusion of the other, but that the attempt is usually made to combine the two forms in such a way as to produce the best results. In France, however, the attempt has been made to devise one method of official constitution which will combine individual responsibility and administrative efficiency with mature deliberation and impartial decision. Here we find by the side of each of the important administrative officers who alone have the actual power of decision and alone are to assume the full responsibility for the acts of the office, a council whose advice must be asked in the more important matters within the jurisdiction of the office but whose advice need never be followed.<sup>1</sup>

### *III.—Honorary and professional officers.*

Officers, like authorities, may be variously classified.<sup>2</sup> In many states there is an important distinction be-

<sup>1</sup> *Supra*, I., pp. 86, III.

<sup>2</sup> See Mechem, *op. cit.*, 9.

tween professional and honorary officers.<sup>1</sup> The first are those officers who devote their entire time to the discharge of public functions, have no other occupation, are indeed by law allowed to have no other occupation, and receive a sufficiently large compensation to enable them to live without resorting to other means. From such officers is often required by law a professional training or more or less knowledge of the affairs to which their official duties relate. In some states this requirement is carried so far as to necessitate the pursuit by the candidates for official positions of a regular course of instruction in administrative matters. A system of administration which relies entirely or mainly upon professional officers is termed a bureaucratic system. In it we find a profession of office-holding and an official class which attends to the administration of public affairs. Honorary officers on the other hand do not devote their entire time to their public duties, but at the same time that they are holding public office may be carrying on some other regular business and find their main means of support in such business or in their private means, since they receive a compensation insufficient to support them. In such a system the office is regarded not as a means of livelihood but as an honor, and candidates for the office are not required to possess any particular knowledge of the duties of the office they may desire to hold. A system of administration which relies entirely or mainly upon such honorary non-professional officers is called a self-government system. In it we find no, or a very small

<sup>1</sup> In the United States the nearest legal distinction to this is that between lucrative and honorary offices, the idea of professional offices being very dim. See *State v. Stanley*, 66 N. C., 59; *Hoke v. Henderson*, 4 Devereux, Law N. C., 1, 21.

class of, professional officers. In it government is administered by members of society who temporarily discharge public functions. There probably never was in the history of the world an absolutely bureaucratic administrative system, though that existing in Prussia from 1720 to 1808 and that established in France in 1800 were pretty nearly completely bureaucratic. On the other hand there has seldom been seen a complete self-government system of administration, though that of England in the eighteenth century was about as near one as can well be imagined. All existing systems of administration are formed of a combination of professional and honorary officers, one of the classes predominating and giving the general tone to the system. In the United States the self-government system predominates; in Europe on the contrary the bureaucratic, especially on the continent, though England is not far behind the continent, and Prussia, and indeed Germany as a whole, has of late been trying to increase the realm of the self-government system.<sup>1</sup> In those countries in which the official system is most scientifically organized we find a clear distinction made between these two classes of officers. This is true of Germany where different rules govern the relations of each class of officers. In other countries, however, while the two classes of officers do really exist, no great attempt is made in the law to distinguish between them. Such for example is the case in the United States.

Each of these two systems, *viz.*, the bureaucratic and the self-government system, has its advantages. The special knowledge and training possessed by profes-

<sup>1</sup> *Supra*, I., p. 301.



sional officers, their generally long terms of office, and the fact that they are occupied exclusively in the management of public business make it almost certain that, when well organized, they will act more wisely and efficiently than officers who have no special knowledge of their duties, who serve for short terms, and are expected to devote only a part of their time to the public service; and make it extremely probable that the cost of such a system will, notwithstanding the fact that salaries are paid, be less than the cost of self-government administration. For these reasons the popular remedy for administrative evils is bureaucracy; and if wise, efficient, and economical administration were the only or even the main end sought in the organization of the administrative system it might be admitted without question that the popular remedy was the proper remedy. But it must never be lost sight of that good administration is only one, and that a minor, end of an administrative system. It must always be kept in mind that the prime end of all governmental systems should be the cultivation in the people of a vigorous political vitality, a patriotic loyalty and social solidarity. History shows that this end is not attained by a bureaucratic system. The experience of every state which, to carry forward pressing reforms or to secure administrative efficiency, has adopted a bureaucratic system of administration goes to prove that bureaucracy is incompatible with civil liberty. The administrative history of France and Germany under the absolute monarchy is a striking example of this fact. The conferring of most of the important administrative powers upon professional officers deprives the citizens of the state generally, of

the opportunity to accustom themselves to public service and to acquire political experience; and finally destroys their ability to protect their liberties in an orderly manner. They also lose interest in the government. They regard with indifference, if not with actual hatred, a government in which they have no participation. Finally the permanent exclusion of the citizens from participation in administration encourages within them the growth of class feeling, which is one of the greatest obstacles to successful government. Seldom, if ever, being obliged to consider public questions from any but the point of view of the class to which they belong; seldom, if ever, being called upon to consider the public effects of any measure, they fail to acquire that sense of collectivism whose cultivation is so necessary. If at the same time that they are shut out from participation in administration the people are allowed to participate in legislation the result is even worse. For they carry with them into the legislative bodies the same narrow class feelings by which they are actuated in their private life. The legislature becomes the fighting ground for hostile social forces instead of being the representative of the collective interests of the whole people. A good example of the effect of a popular legislative assembly when combined with a bureaucratic administration is to be found in the administrative history of Prussia from 1822 to 1860.<sup>1</sup> True socialism never makes a greater mistake than when it allies itself, as it is so apt to do, with bureaucratic administration. Bureaucratic administration has thus in all governments most evil results but most particularly in

<sup>1</sup> See *Supra*, I., 298; *Political Science Quarterly*, IV., p. 656 *et seq.*

popular governments where the people are allowed to participate in legislation. Its efficiency easily becomes tyranny; its economy is dearly paid for by the loss of political capacity and the growth of social faction.

What the bureaucratic system tends to destroy the self-government system tends to foster. The participation of numerous citizens in the work of administering government not only tends to increase by the sure method of practice the political capacity of the people, but also causes them to regard the government as their own and finally brings them to consider public measures from a point of view other than that of their own social class, to consider what influence they will have on the community as a whole. The almost complete absence of social parties in England during the sway of the self-government system is a striking example of the influence of this system of administration. Of course reliance cannot be placed alone upon the administrative system to bring about these results. The admonitions of religious teaching and the influences of a lofty humanitarian philosophy have their part in the work to perform,<sup>1</sup> but it should be recognized that the administrative system has an important influence in the conquest of human selfishness in the form of class tyranny.

There are, however, some branches of administration in which the radical defects of the system of popular non-professional officers are very marked. The inherent weaknesses of the self-government system—its extravagance, its inefficiency, and the unwisdom of its actions—become so serious as to force the conclusion that in some branches self-government is impos-

<sup>1</sup> Cf. Gneist, *Das Englische Parlament*, Introduction.

sible. There are many positions in the municipal administration particularly—positions which are increasing in number with the increase of the duties of the administration—which require great technical knowledge, whose duties are so arduous as to occupy the entire time of the incumbents. Here it seems necessary to demand of the incumbents a professional training and to pay them salaries.<sup>1</sup> Bureaucracy is made necessary by the conditions of the case. The question is not whether we shall have a bureaucracy—for we must in the nature of things have it—but how we shall organize it so as to give it the best proportions possible and so as to avoid the evil results by which it is so generally attended. Especially must care be taken not to organize the bureaucracy on the principles which are applicable to the self-government system. If salaries are to be paid, professional knowledge and the devotion of the entire time of the officer to the work of the office should be required also, since the impossibility of such an officer's earning his living in any other way is the only reason why a salary should be paid. Long terms of office should take the place of the short terms of the self-government system. What should be a profession should not be allowed to degenerate into a trade. Finally the system should be so organized that the people from whom the governmental power comes and for whose benefit it is to be exercised, should have a control over the bureaucracy in order that the deliberate wishes of the community may have their expression in the action of the administration.

<sup>1</sup> Cf. President Eliot in the *Forum*, October, 1891, on "One Remedy for Municipal Mis-government"; Gumplowicz, *Das Oesterreichische Staatsrecht*, 179, 180.

## CHAPTER II.

### THE FORMATION OF THE OFFICIAL RELATION.

#### *I.—Appointment or election.*

Of the various methods of forming the official relation the two most important are appointment and election. There are, it is true, several others less important. Thus the official relation is sometimes formed by the drawing of lots as in the case of the jury; often other things being equal the official relation is formed as a result of seniority and juniority. Thus in the French elections the two oldest and the two youngest electors present at the opening of the polls and able to read are the canvassers of elections.<sup>1</sup> In other cases office is gained by inheritance. We find numerous examples of this method among the offices of the royal household in England.<sup>2</sup> But this method is becoming rarer and rarer as time goes by. Originally the common method of filling offices in the United States was an executive appointment. The only exception to this rule was to be found in the case of the town officers. Partisan use was early made of the power of appointment in New York. Each new party that came into power felt that it was its right to fill all offices to

<sup>1</sup> L. May 5, 1884, art. 31.

<sup>2</sup> Gneist, *Das Englische Verwaltungsrecht, etc.*, 1884, 167.

which appointment might be made with its own adherents and to make places for them by the discharge of existing officers.<sup>1</sup> This habit was not confined to New York but afterwards made its way into the national administration and thence spread to every one of the commonwealths. The evils resulting from such a practice led the people very generally to change the method of forming the official relation. Many of the offices were made elective. The movement continued from 1825 to 1850 with the final result that almost all the important offices were filled by popular election both in the central commonwealth government and in the localities. Since 1850, however, there has been somewhat of a reaction in favor of the old method by executive appointment, the reason being found in the fact that the method by election did not have the beneficial results which were expected of it. No change in the original method of forming the official relation was made in the national administration, not because the same evils were not present, but because the method of appointment being provided by the national constitution could be changed only with very great difficulty. In all cases where the method of appointment has been adopted the appointment is not necessarily to be made by the administrative chief, but in many cases by the heads of the executive departments, and in the localities by the chief local authorities.<sup>2</sup>

In both France and Germany the great majority of offices both central and local are filled by executive appointment, the only officers of importance who are

<sup>1</sup> Gitterman, "New York Council of Appointment," *Pol. Sci. Qu.*, VII., 80.

<sup>2</sup> *Supra*, I., pp. 146, 243, 274.

elected being the members of the various local deliberative assemblies.<sup>1</sup> In England the original rule was to fill offices by appointment, but with the change in the system of local government many local authorities have become elective.<sup>2</sup>

The aims of these two methods of forming the official relation are quite different. The method of appointment aims at administrative harmony and efficiency. The method of election endeavors to ensure that popular control over the administration which is the fundamental principle of popular government. In order, however, that such a popular control may be exercised, the people must be in a position to judge of the merits of the respective candidates for office. They are undoubtedly in such a position in the rural districts where the feeling of neighborhood is strong. Here the people know the merits of the candidates who present themselves for local office and are in a position to make a wise choice. When we come, however, to more complex conditions such as exist, for example, in the central commonwealth administration and in the municipalities where the feeling of neighborhood is not strong, and where it will be difficult, if not impossible, for the people to know much about the merits of the different candidates, it is useless to adopt the elective method in the hope that the people will by its means be able to exercise any appreciable control over the administration. The only way in which the people may exercise such a permanent control over the administration is for them to elect only the most prominent officers of the government who are then to appoint to the subordinate offices. If a long list of

<sup>1</sup> *Supra*, I., pp. 84, 91, 302, 305.

<sup>2</sup> *Supra*, I., p. 237.

candidates is presented to the elector for his choice, if many of the offices to be filled by election are of a subordinate or unimportant character, even the most intelligent voter is apt to become confused. Other reasons than the positive merits of the candidates are apt to influence his choice, and the result of the election is apt to be in accordance with the wishes of those few persons who have the time and the inclination to busy themselves with the conduct of public affairs, rather than in accordance with the wishes of the people. The elective method thus in many cases does not secure the popular control, in order to secure which it is adopted. It not only fails of its purpose but it has one or two serious positive defects. Through its means it is often the case that men of totally opposed views on vital questions are put into office, where, in order that the administration may be efficient, it is necessary that it be harmonious. The necessity for harmony in some matters is so great that it is attained but through the crooked and devious methods known to practical politics as "deals," "dickers," and "rings." Such methods are in reality attempts to obtain the harmony which is so necessary to efficient administration; their great fault is that through them the popular control over the administration is destroyed and the responsibility for administrative action is diffused. For these branches of administration, *i. e.* the central commonwealth administration and the municipal administration, the method of forming the official relation should be by appointment if an efficient, harmonious, and responsible administration under popular control is desired. This is the method which has been so successfully adopted in the national administration. This is



also the method which has been adopted by the most recent and important municipal charters in the United States.<sup>1</sup>

Further the elective method of filling offices is in all instances unfitted for offices the efficient performance of whose duties requires the possession by the incumbents of large professional or technical knowledge. Such offices are those of judge, law officer, civil engineer, *etc.*, *etc.* The requirement of the possession by the candidate of certain degrees or certificates, which are supposed to evidence the necessary qualifications, is not really sufficient. For the people even if their choice is thus confined are here again not in a position to choose wisely. Popular inclination is too apt to be swayed by other than scientific reasons. Such a method may shut out absolute ignorance from office; it will not, however, usually result in the choice of the best man for the office.

## II.—*The law of elections in the United States.*<sup>2</sup>

The general rule is that the legislature may, in the absence of constitutional provision either granting or denying the power, pass reasonable regulations as to the method of holding elections.<sup>3</sup> In the exercise of this power the legislatures have very generally provided for the registration of voters as a necessary prerequisite to the casting of their votes. In two of the commonwealths, however, registration laws have been

<sup>1</sup> *Supra*, I., p. 210.

<sup>2</sup> The qualifications of voters are a matter rather of constitutional than of administrative law, and therefore will not be considered. For particulars see McCrary, *The Law of Elections*, 3d Ed., secs. 1-21.

<sup>3</sup> *Commonwealth v. McClelland*, 83 Kentucky, 686. This power is expressly granted in many of the constitutions. Stimson, *op. cit.*, sec. 235.

expressly forbidden, *viz.*, Arkansas and Texas, while in two others the provisions of the constitution are such as to render them practically nugatory. These are Pennsylvania and West Virginia, where no person may be deprived of his right to vote by reason of not having registered.<sup>1</sup> Such registration laws have been held to be reasonable regulations, and, as such, perfectly constitutional<sup>2</sup>; but a law which provides a method of voting by which it is impossible for an illiterate person to vote is not reasonable, and is therefore unconstitutional.<sup>3</sup> As a general thing, election regulations are directory rather than mandatory, and their violation, provided the will of the people is clearly expressed, will not invalidate the election.<sup>4</sup>

The general rules with regard to elections are:

1. *The election must be regular.*—Elections must always be held at the time and place appointed by the proper authority.<sup>5</sup> This authority may be the constitution, a statute, or an administrative act.<sup>6</sup> The action of the proper agency is necessary, and if the holding of the election is contingent upon the happening of some event, that event must have happened.<sup>7</sup>

2. *Necessity of notice.*—Notice of the time of elections does not seem to be necessary, even when expressly required by statute, except where such notice is in the nature of things necessary in order that the voter may know that an election is to take place. Its

<sup>1</sup> Stimson, *op. cit.*, sec. 236.

<sup>2</sup> Commonwealth v. McClelland, 83 Kentucky, 686.

<sup>3</sup> Rogers v. Jacobs, 11 S. W. Rep., 513.

<sup>4</sup> Trimmer v. Bomar, 20 S. C., 354.

<sup>5</sup> Mechem, *op. cit.*, sec. 170.

<sup>6</sup> Brodhead v. Milwaukee, 19 Wis., 624; Brewer v. Davis, 9 Humph. Tenn., 208.

<sup>7</sup> Stephens v. People, 89 Ill., 337.

absence will not necessarily invalidate an election, even if it has been expressly required. Thus the failure to give notice of a general election, though required by law, will not invalidate the election.<sup>1</sup> But a special election would not be regarded as valid in case no notice of it was given.<sup>2</sup> While notice of the time of elections is not always necessary, notice of the place of holding the election seems to be absolutely necessary; indeed all enactments as to the place of elections are regarded as mandatory rather than directory. Failure to observe them will generally invalidate the election.<sup>3</sup> It has been held, however, that in a case of an emergency the place may be reasonably changed provided notice is given.<sup>4</sup>

3. *Method of voting (ballot).*—As a general thing the vote must be by ballot.<sup>5</sup> The word ballot originally meant a little ball by the casting of which it was at first proposed that the vote should be taken,<sup>6</sup> but it has come to mean in public law a slip of paper, sometimes called a voting paper, on which the name of the candidate to be voted for is printed or written. As the main object of the ballot is a secret vote<sup>7</sup> the statutes regulating the ballot have in the course of time gone more and more into detail as to the form, appearance, and manner of folding the ballot, each statute endeavoring to remedy some defect

<sup>1</sup> *People v. Hartwell*, 12 Mich., 508; *People v. Cowles*, 13 N. Y., 350.

<sup>2</sup> *Secord v. Foutch*, 44 Mich., 89; *State v. Gloucester*, 44 N. J. L., 137; *Mechem*, *op. cit.*, sec. 176.

<sup>3</sup> *Melvin's Case*, 68 Pa. St., 333.

<sup>4</sup> *Brodhead v. Milwaukee*, 19 Wis., 624; *Dale v. Irwin*, 78 Ill., 170, 181; *Farrington v. Turner*, 53 Mich., 27; *Knowles v. Yeates*, 31 Cal., 82.

<sup>5</sup> *Stimson*, *op. cit.*, sec. 231.

<sup>6</sup> Theodore W. Dwight, on "Harrington," in *Pol. Sci. Qu.*, II., 16.

<sup>7</sup> *Cf. Cooley*, *Constitutional Limitations*, 6th Ed., 760.

that had manifested itself, and by which the secrecy of the ballot was violated, until now the most common method of voting in the United States is by means of ballots absolutely uniform in appearance and size, having no marks upon them by means of which they may be distinguished one from the other when folded. These ballots are in many cases issued by officers of the government, and are printed at the expense of the government. A further result of the great desire for secrecy in voting is to be found in the fact that the courts in their decisions have aided the legislature, in stamping as an illegal ballot, and therefore as a ballot which may not be counted, any ballot which violates, in what at times seems only an unimportant point, the provisions of the statutes requiring secrecy.<sup>1</sup> The only other rule of importance as to the ballot is that requiring that it shall express clearly the intent of the voter. This rule, however, the courts do not carry so far as to throw out ballots for trifling irregularities.<sup>2</sup> In case the ballot is not clear on its face the best rule would seem to be that the courts may consider extrinsic evidence in explanation of it.<sup>3</sup> The ballots, after they have been cast, are counted by officers called canvassers, whose duties are usually ministerial in character,<sup>4</sup> and who, after they have once acted, have exhausted their powers and are not allowed to change their decision except as ordered by the courts.<sup>5</sup>

4. *What constitutes an election to office.*—As a general thing a candidate is elected to office by a plurality<sup>6</sup>

<sup>1</sup> Mechem, *op. cit.*, secs. 192-4.

<sup>2</sup> *Ibid.*, secs. 195-202.

<sup>3</sup> Cooley, *Constitutional Limitations*, 6th Ed., 768 ; *People v. Pease*, 27 N. Y., 45, 84.

<sup>4</sup> *Hadley v. Albany*, 33 N. Y., 603.

<sup>5</sup> Mechem, *op. cit.*, sec. 208.

<sup>6</sup> *Stimson, op. cit.*, sec. 232.

of the legal ballots cast, even though a majority of legal voters have not voted.<sup>1</sup> In the leading case of *People v. Clute* it was held, that a majority of votes cast for an ineligible candidate, if the ineligibility were not notorious, invalidated the election; that such votes were not to be regarded as merely illegal votes with the result that the candidate having the next highest number of votes would be elected. This seems to be the better rule in the United States.<sup>2</sup>

### III.—The law of appointment.

The courts have sometimes attempted to hold in the United States that as the act of appointment is in its nature an essentially executive act, the exercise of the appointing power by any other than an executive or administrative authority is unconstitutional in a state whose constitution provides for the separation of powers<sup>3</sup>; but the difference as to the adoption in the constitutions of the various commonwealths of the principle of the separation of powers, and the different views held by the judges as to the meaning of the principle of the separation of powers when adopted have brought it about that this rule is not at all universal.<sup>4</sup> As to what constitutes an appointment the best rule would seem to be that it consists in the choice by the appointing power of the person appointed<sup>5</sup>; and is complete when the last act of the appointing power has been performed, as *e. g.* in the case where

<sup>1</sup> *People v. Clute*, 50 N. Y., 451.

<sup>2</sup> *Mechem, op. cit.*, sec. 206.

<sup>3</sup> *State v. Denny*, 118 Ind., 449; *Evansville v. State*, *Ibid.*, 426; see also *State v. Kennon*, 7 Ohio St., 546, 560.

<sup>4</sup> See *Mayo v. State*, 15 Md., 376; *People v. Mahany*, 13 Mich., 481; *People v. Hurlburt*, 24 Mich., 44, 63.

<sup>5</sup> *Johnston v. Wilson*, 2 N. H., 202.

the consent of some other authority than the one proposing the appointment is necessary, in the grant of the consent of that body.<sup>1</sup> Finally, in the absence of any statutory provision to the contrary, the completion of the appointment is not dependent upon the issue of any commission, which is merely evidence of the appointment and is not the appointment itself.<sup>2</sup> Thus if the commission has been issued to the wrong person it may be revoked and a commission granted to the proper person.<sup>3</sup> It is not as yet well settled in what form the appointment is to be made, whether it must be made in writing or whether an oral appointment is sufficient.<sup>4</sup> But the power however exercised, once exercised, is exhausted and the appointing power may not revoke the appointment, provided of course that the term of the appointee is not in the discretion of the appointing officer, when of course the appointee might be removed from office, and provided that there has not been some mistake in the issue of the commission.<sup>5</sup>

#### IV.—Acceptance of the office.

While as a general thing no obligation to assume a professional office is imposed upon its citizens by any government,<sup>6</sup> it is not unfrequently the case that the law compels the citizen to take an honorary office

<sup>1</sup> *State v. Barbour*, 53 Conn., 76 ; *Marbury v. Madison*, 1 Cranch, 137.

<sup>2</sup> *Ibid.* ; *Mechem, op. cit.*, sec. 117.

<sup>3</sup> *Gulick v. New*, 14 Ind., 93 ; *State v. Capens*, 37 La. Ann., 747.

<sup>4</sup> *Cf.* *People v. Murray*, 70 N. Y., 521, which holds that the appointment must, in the absence of statutory provision to the contrary, be in writing, with *Hoke v. Field*, 10 Bush, K'y., 144, which holds that it may be made orally.

<sup>5</sup> *People v. Woodruff*, 32 N. Y., 355 ; *State v. Barbour*, 53 Conn., 76 ; *Gulick v. New*, 14 Ind., 93.

<sup>6</sup> *Cf.* *Hinze v. People*, 92 Ill., 406, in which the judge says that no man can be compelled to assume a professional office.

whose duties are not so arduous as to require the entire time of the incumbent. This seems to have been the original rule in England, where acceptance of a municipal office might be compelled by means of the writ of mandamus,<sup>1</sup> and where failure to assume office might generally be punished by indictment.<sup>2</sup> The strictness of this rule has been somewhat relaxed in this country, where the rule has been retained. Thus where the office is in any sense obligatory, relief from the operation of the rule may be obtained by the payment of a fine, which in some cases, as *e. g.* in the case of the office of supervisor in New York, has been as high as \$50. Even in these cases the law generally states that certain excuses are sufficient to relieve from service, large discretion in the matter of accepting an excuse being usually granted.

Further it has been held that the holding of one office will relieve from the obligation of accepting another.<sup>3</sup> Finally where acceptance of the office is not obligatory some formality indicative of the intention to assume the office seems to be necessary in order that the office may be regarded as filled.<sup>4</sup> Qualifying for the office is regarded as the best evidence of acceptance.<sup>5</sup> Refusal, and neglect to qualify will be regarded as a refusal, will operate to extinguish any right which the officer has to the office; although mere delay will not have this effect.<sup>6</sup>

In France it is almost never the case that the acceptance of office is obligatory. In Germany the rule is

<sup>1</sup> *Rex v. Bower*, 1 B. & C., 585.

<sup>2</sup> See *State v. Ferguson*, 31 N. J. L., 107.

<sup>3</sup> *Hartford v. Bennett*, 10 Ohio St., 441.

<sup>4</sup> *Johnston v. Wilson*, 2 N. H., 202; *Smith v. Moore*, 90 Ind., 294, 306, 313.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Mechem, op. cit.*, secs. 266, 433, 434.

very much the same as in the United States, but where the obligation to serve does exist, the penalty for refusal to serve is much more severe.<sup>1</sup> In England the old rule of obligatory service has been much modified. Much more reliance is placed on voluntarism than formerly. There are still, however, instances of obligatory official service, as *e. g.* in the municipal service where most of the unpaid municipal offices are obligatory.<sup>2</sup>

V.—*Officers de facto.*

While it is in general true that the official relation can be formed only in one of the ways recognized by the law, and that the acts of persons who without right intrude into offices are absolutely void both as against the public and third persons, it is also a general principle of the English common law, based upon reasons of public convenience, that persons who, though not legally officers, have yet acted under color of right, *i. e.* have been declared elected or appointed or have held over in office in good faith, or whose assumption of office has been for a long time acquiesced in by the public, are regarded for many purposes as officers; and that their acts will be given the same faith and credit as the acts of *de jure* officers. Such persons are called officers *de facto*.<sup>3</sup> It has, however, been held that an office must be originally established by law, *i. e.* that while there may be an officer *de facto* there can never be an office *de facto*.<sup>4</sup> One result of this rule as to the acts of officers *de facto* is that such acts may not, any

<sup>1</sup> *Supra*, I., p. 327.

<sup>2</sup> *Supra*, I., p. 255.

<sup>3</sup> See *Plymouth v. Painter*, 17 Conn., 585; *Hamlin v. Kassafer*, 15 Oregon, 465; *State v. Carroll*, 38 Conn., 449 and cases cited.

<sup>4</sup> *Norton v. Shelby Co.*, 118 U. S., 425, 442.



more than the acts of officers *de jure*, be impeached in a collateral proceeding to which the officer is not a party.<sup>1</sup> This is not, however, true of the acts of mere intruders because their acts are absolutely void.<sup>2</sup> Indeed the mere intrusion into an office without color of right cannot be said to result in any of the incidents of the official relation with the exception that the intruder may be forced by the government to account for moneys which he may have received.<sup>3</sup> While for reasons of public convenience the acts of officers *de facto* are given in collateral proceedings the same force and credit as are given to the acts of officers *de jure* this rule is not so applied as to permit an officer *de facto* to build up any claims for himself from the fact that he has assumed office. Thus he cannot recover compensation,<sup>4</sup> nor may he bring action in his official capacity without showing title,<sup>5</sup> nor may he, when sued, escape responsibility for an act which may be justified only by a valid title to the office.<sup>6</sup> A further result of this position of officers *de facto* is that they are liable for damages resulting from their negligence,<sup>7</sup> must perform all the duties connected with the office during the time they assume to hold it<sup>8</sup> and may be punished criminally for the commission of official crimes.<sup>9</sup>

<sup>1</sup> *Ibid.* ; *People v. Hopson*, 1 Denio, N. Y., 574, 579.

<sup>2</sup> See *Conway v. City of St. Louis*, 9 Mo. Appeals, 488.

<sup>3</sup> See *U. S. v. Maurice*, 2 Brock. U. S., 96.

<sup>4</sup> *People v. Tieman*, 30 Barb. N. Y., 193 ; *Dolan v. the Mayor, etc.*, 68 N. Y., 274.

<sup>5</sup> *People v. Weber*, 89 Ill., 347.

<sup>6</sup> *Green v. Burke*, 23 Wendell N. Y., 490-503 ; *Riddle v. Bradford*, 7 S. & R. Pa., 386, 392 ; *Rodman v. Harcourt*, 4 B. Mon. K'y, 224, 229 ; *Patterson v. Miller*, 2 Metc. K'y, 493, 496.

<sup>7</sup> *Longacre v. State*, 3 Miss., 637.

<sup>8</sup> *Kelly v. Wimberly*, 61 Miss., 548.

<sup>9</sup> *Diggs v. State*, 49 Ala., 311 ; *State v. Goss*, 69 Me., 22 ; see also *Mechem, op. cit.*, secs. 315-346.

## CHAPTER III.

### QUALIFICATIONS FOR OFFICE.

#### *I.—Elective officers.*

1. *Right to provide qualifications.*—Nowhere does the law permit any one and every one to hold offices. In all countries certain qualifications of eligibility for office are prescribed. For the power to hold office is not generally a right guaranteed by the constitution, but rather a privilege usually granted to all electors or citizens but sometimes granted to persons who are neither citizens nor electors and sometimes not to all electors or citizens, and in all cases subject to the regulation of the legislature in the absence of constitutional restriction.<sup>1</sup> As a general thing in the United States it is held, either as the result of a direct constitutional provision or as a result of the interpretation put by the courts upon certain general constitutional provisions, that political and religious opinions may not be made a test. Thus it has been held that it is not within the power of the legislature to provide that two members of a board of four members shall be chosen from each of the two leading political parties.<sup>2</sup>

<sup>1</sup> See *Ohio v. Covington*, 29 Ohio St., 102, holding that an educational qualification is proper; *Darrow v. People*, 8 Col., 417, holding that a property qualification is proper; *cf. Barker v. People*, 3 Cowen N. Y., 686.

<sup>2</sup> *Evansville v. State*, 118 Ind., 426, 435; *People v. Hurlburt*, 24 Mich., 44, 93; *Attorney General v. Detroit Common Council*, 58 Mich., 213, 215. See

2. *Usual qualifications.*—The qualifications which have been established for elective officers are in all countries pretty much the same. They consist for the most part in citizenship or the right to vote,<sup>1</sup> the attainment of a certain age, the possession of good character,<sup>2</sup> and for the majority of offices the possession of the male sex. This is not generally the case in the United States for school offices, and in some commonwealths, as *e. g.* Kansas, is not the case for municipal offices.<sup>3</sup> In the absence of special statutory provision as to the eligibility of women there is no fixed and universal rule as to the matter in the United States. In *Robinson's Case*<sup>4</sup> it is said that the male sex is required where no provision as to the eligibility of women exists, though it is admitted there is no constitutional objection to their being made eligible by statute.<sup>5</sup> On the other hand the contrary rule, *viz.*, that women are eligible in the absence of statutory provision, seems to be held in *In re Hall*.<sup>6</sup> For local officers, further, residence in the locality in which the duties of the office are to be performed, or some equivalent therefor, is

also *Mayor v. State*, 15 Maryland, 376, 468. But see *Rogers v. Buffalo*, 123 N. Y., 173, which holds that a law providing that not more than two members of a board shall belong to the same political party is perfectly proper. In some of these cases the decision of the court was to a certain extent influenced by the fact that it was impossible for the court to decide whether a person belonged to one of the leading political parties.

<sup>1</sup> See *State v. Smith*, 14 Wis., 497; *State v. Murray*, 28 Wis., 96; *State v. Trumpf*, 50 Wis., 103. But see *In the matter of Ole Mosness*, 39 Wis., 509, 511, where the court says that extra-territorial officers, as *e. g.* commissioners, to take acknowledgments, need not be citizens or electors.

<sup>2</sup> See *Mechem, op. cit.*, secs. 77-80, particularly for the usual disqualification resulting from conviction for crime.

<sup>3</sup> For a summary of the rules with regard to the eligibility of women to office see M. Ostrogorski in the *Political Science Quarterly*, VI., 677.

<sup>4</sup> 131 Mass., 376, 383.

<sup>5</sup> See 115 Mass., 602, and *Huff v. Cook*, 44 Iowa, 339.

<sup>6</sup> 50 Conn., 131.

generally required. Finally the possession of real property is often required, particularly in the case of local offices. This last qualification is more common in Europe than in the United States.<sup>1</sup> In the case of offices of a technical or professional character the law usually requires that the candidate must have undergone some training or possess some degree or certificate. Thus no one but an engineer by profession may be elected to the position of state engineer and surveyor in New York.<sup>2</sup> Further where judges and prosecuting officers are elected by the people it is usually provided that the candidate for such positions shall be a counsellor at law of a certain number of years' standing.<sup>3</sup> Finally in many cases the possession of one office will disqualify for others.<sup>4</sup> There is not absolute agreement in the decisions as to when the qualifications required by law must exist, some decisions holding that they must exist at the time of the election<sup>5</sup>; others holding that it is sufficient if they are present at the beginning of the term of office, holding that the qualification is not one for election, but for holding office.<sup>6</sup>

## II.—Appointed officers in the United States.

For appointed officers the qualifications differ considerably in the different countries and in many cases

<sup>1</sup> See Mechem, *op. cit.*, sec. 81, and *Darrow v. People*, 8 Col., 417; *supra*, I., p. 320.

<sup>2</sup> Constitution, art. v., sec. 2.

<sup>3</sup> See *People v. May*, 3 Mich., 598.

<sup>4</sup> See *People v. Clute*, 50 N. Y., 451; *infra*, II., p. 96.

<sup>5</sup> *Searcy v. Grow*, 15 Cal., 117, followed by the later decisions in that commonwealth; *Parker v. Smith*, 3 Minn., 240; *State v. Clark*, 3 Nev., 519; *State v. McMillen*, 23 Neb., 385.

<sup>6</sup> *State v. Murray*, 28 Wis., 96; *State v. Trumpf*, 50 Wis., 103; *Smith v. Moore*, 90 Ind., 294; *Privett v. Bickford*, 26 Kan., 52. Some of the later Wisconsin cases hold to this rule only on the ground of *stare decisis*, and recognize that the other rule is the better one.

are much more stringent than are those for elective offices.

1. *General qualifications.*—The first of the general qualifications for appointment to office in the United States is the possession of citizenship or the right to vote. This does not, however, appear to be the universal rule. There is nothing in the statutes of the United States national government absolutely decisive on the point. The United States Revised Statutes which govern the form of the official oath<sup>1</sup> seem to presuppose that citizenship is necessary but nowhere is it expressly required. The civil-service law of 1883 does not require citizenship but general rule III<sup>2</sup> passed in execution of the law would seem to require citizenship for the classified service. In New York also civil-service rule 35 requires citizenship for the classified service, and in Massachusetts it would seem to be required for all positions in the service except expert positions.<sup>3</sup> But apart from these provisions the law does not seem to be explicit on this point; and it is well known that many positions in the diplomatic and consular services are filled by persons who are not citizens of the United States. A qualification akin to that of citizenship is that of residence. In New York and Massachusetts the rules require a residence in the commonwealth of one year for positions in the classified service.<sup>4</sup> In the national service there is a peculiar rule for the classified departmental service. This is<sup>5</sup> that appointments to the classified public service at Washington shall be apportioned among

<sup>1</sup> Secs. 1756-7.

<sup>2</sup> Sec. 8.

<sup>3</sup> Civil-Service Rule VII., 1.

<sup>4</sup> N. Y. Rule 35 ; Mass. Rule VII., 1, which requires it for all positions in the service with the exception of expert positions.

<sup>5</sup> Civil-Service Law, sec. 2, third ; Departmental Rule VII., 2.

the commonwealths, territories, and the District of Columbia in accordance with their population as fixed by the last census. This rule has been regarded by some of the best administrative officers of the government as a detriment to the service and is from the point of view of administrative science absurd in the extreme.

The next general qualification is to be found in the limits of age at which entrance into the service is allowed. The purpose of these provisions is to exclude the too young and the too old. The limits of age vary with the particular branch of the service from a minimum of sixteen for the position of junior clerk in the classified postal service to a maximum of fifty for the position of superintendent in the classified Indian service.<sup>1</sup> Generally, however, all persons between the ages of twenty and forty-five may enter the classified service. In New York the limits of age are fixed by the civil-service commission after consultation with the heads of departments, differences between the two being settled by the governor.<sup>2</sup> These vary from a minimum of eighteen for messengers to a maximum of fifty for clerical positions.<sup>3</sup> In the United States national, the New York service, and the Massachusetts service these limitations do not apply to persons who have been honorably discharged from the military or naval services of the United States. Such persons it is well to note are always to be preferred by the appointing officers.<sup>4</sup>

<sup>1</sup> Postal Rule II., 2; Indian Rule II.

<sup>2</sup> N. Y. Rule 24; *cf.* Massachusetts Rule X. which requires a certain age only for certain branches of work.

<sup>3</sup> See sixth report of the New York civil-service commission, 464. See also Mechem, *op. cit.*, sec. 71.

<sup>4</sup> U. S. L. 1883, c. 27, sec. 7; N. Y. L. 1884, ch. 410; Mass. L. 1887, ch. 437; *cf.* Mechem, *op. cit.*, sec. 84, especially for the decisions in construction and application of these laws.

The third general qualification is to be found in the possession of good character. The civil service laws very generally provide in addition to the usual disqualification for conviction of crime<sup>1</sup> that no person shall be appointed to office who habitually uses intoxicating beverages to excess, while the Massachusetts law also disqualifies all liquor sellers.<sup>2</sup> The rules also generally provide that no person shall be appointed in the classified service who has been guilty of a crime or of notoriously disgraceful or infamous conduct.<sup>3</sup> Finally it is provided in the rules generally that certificates of good moral character shall be presented at the time that the application for appointment is made, and that when such recommendations are made by public officers, especially by legislative officers, no part of such recommendation, except such as bears upon the character of the applicant, shall be considered by the appointing officer.<sup>4</sup>

Finally it is to be noticed that the male sex is not generally required for appointed officers. Thus it has been held or intimated that a woman may be appointed to the position of postmistress and pension agent,<sup>5</sup> to that of deputy clerk,<sup>6</sup> and to that of master in chancery.<sup>7</sup> Further the rules in the United States national service and in the Massachusetts service seem to presuppose that women will be appointed.<sup>8</sup>

<sup>1</sup> For this see Mechem, *op. cit.*, secs. 77-80.

<sup>2</sup> U. S. L. 1883, c. 27, sec. 8; Mass. L. 1884, c. 320, sec. 4.

<sup>3</sup> U. S. Gen. Rule IV., 2, III., 8; N. Y. Rule 10; Mass. L. 1884, c. 320, sec. 4.

<sup>4</sup> U. S. L. 1883, c. 27, sec. 10; N. Y. L. 1883, c. 354, sec. 9.

<sup>5</sup> *In re* Hall, 50 Conn., 131, 137.

<sup>6</sup> *Jeffries v. Harrington*, 17 Pac. Rep. (Col.), 505.

<sup>7</sup> *Schuchardt v. People*, 99 Ill., 501.

<sup>8</sup> U. S. Department Rule VII., 1, b; Massachusetts Rule XI., 2.

2. *Intellectual capacity*.—The most important qualification for appointed officers is that of capacity, which may be either physical or intellectual. Physical capacity, when required, is to be shown either by certificates of persons acquainted with the applicant or of physicians,<sup>1</sup> or by examinations made either by a physician or in the nature of tests requiring unusual strength or agility, as *e. g.* the positions in the police and fire services of the cities or in the national revenue marine service. Sometime, and generally in order to be qualified for these positions, the applicant must be of a certain weight, a certain height, *etc., etc.*<sup>2</sup>

Originally there seem to have been really no legal requirements as to intellectual capacity in the United States for appointed officers. The earliest instance of qualifications for capacity in the English law is said to be found in the case of the office of the sheriff of London. In order to be qualified for this position, the candidate was, in a time when the arithmetical capacity of the ordinary man was not great, obliged to count six horse-shoes and sixty-one nails. To prove physical capacity the candidate was obliged to cut a bundle of sticks. While this severe test of intellectual capacity has fallen into disuse, it is said that it is still necessary for the candidate for the office of sheriff in London to cut the bundle of sticks which now consists of a bundle of matches.<sup>3</sup> It was believed in the United States that the officers to whom the power of appointment had been given, would of their own accord

<sup>1</sup> U. S. Gen. Rule III., 8 ; N. Y. Rule 10 ; Mass. Rule XII.

<sup>2</sup> See Massachusetts Rule X., XXII.; Comstock, *The Civil Service of the United States*, 578 *et seq.*, 582.

<sup>3</sup> See Peck v. Rochester, 3 N. Y., Sup., 872, citing Hare, *Walks in London*, N. Y. Ed., II., 272, 273.

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choose the best men that they could obtain. With the growth of party government, partisan rather than administrative considerations came in many cases to govern the action of the appointing officers, both in the national and the commonwealth governments. The natural result of such a practice was a deterioration in the character of appointees; and as early as 1853 the attempt was made by Congress to prevent the appointment of absolutely incapable persons by providing that all appointees must pass an examination before they might enter the clerical service at Washington, which was divided at about the same time into classes, whence the name of classified service. This pass examination was to be conducted by officers of the departments to which the law applied. The plan was not successful when put into operation, but nothing further was done until 1870, when President Grant, in his message to Congress of that year, advocated the adoption of a system of competitive examinations. The result of the message was the passage of a law, now partly incorporated into the revised statutes, which authorized the President to prescribe such regulations for the admission of persons into the civil service of the United States as would best promote its efficiency and ascertain the fitness of each person in respect to age, health, character, knowledge, and ability for the branch of the service into which he sought to enter. For this purpose the President was authorized to appoint suitable persons to conduct the examinations which it was intended to establish. The President issued a set of rules and appointed a commission. The system of competitive examinations went into effect, and according to the statements of the highest administrative

officers of the government proved eminently successful. But in 1874 Congress, in which from the first there had been considerable opposition to the system, refused to make the necessary appropriations to carry on the work of the commission, and the rules generally ceased to be enforced. The rules still continued to be applied in the New York custom-house, were later extended to the post-office, and were so successful that in 1883 the present civil-service law was passed. A law similar to it was passed in New York and Massachusetts, and the plan has been adopted in the city of Philadelphia by a Pennsylvania law of 1885.

Before entering upon the consideration of the provisions of these laws and the rules as to capacity issued by the executive in execution of them it must be noted that they are not mandatory upon either the President or the governor. They simply authorize him to appoint commissions to aid him in the work and to issue rules as to the details of the competitive or other examinations which are intended by the laws to be established. But as soon as such rules are once promulgated they become binding upon the heads of departments having the appointing power as a result of legislative enactment.<sup>1</sup> For since the power of appointment is in these cases based upon legislation its extent can be changed by legislation. On this account it cannot be said that the civil-service laws are unconstitutional so far as the relations of the chief executive and the ordinary heads of departments are concerned.<sup>2</sup>

<sup>1</sup> Cf. *United States v. Perkins*, 116 U. S., 483; see also *Peck v. Rochester*, 3 N. Y. Sup., 872, where the city was enjoined from paying a salary to a city official on the ground that his appointment had been made in violation of the law; see also *Rogers v. Buffalo*, 2 *Ibid.*, 326.

<sup>2</sup> See Dorman B. Eaton's brief in the *Hinckley* case, *New York Times*, Sept. 28, 1885.

Where, however, the head of a department has the appointing power as a result of constitutional provision, it has been held in several decisions that the chief executive may not, even if authorized by statute, prescribe rules for appointment to the service which limit the power of appointment of such head of department by requiring that he shall select his subordinates as a result of a competitive examination.<sup>1</sup> The effect of these decisions has been to take away a large part of its force from the civil-service-reform movement in New York. For the superintendent of public works and the superintendent of prisons have the appointing power by grant of the constitution and appoint by far the greatest number of the administrative subordinate officers of the central government of the commonwealth of New York.<sup>2</sup>

The law and rules of the United States national government do not attempt to prescribe intellectual qualifications for all positions in the national service, but start out by exempting certain positions from the operation of the rules. Thus section 7 of the law provides that none of the Senate appointments shall be classified for examination except with the consent of the Senate which up to the present time has neither been asked for nor given, and that persons in the secret service of the government and laborers shall not be obliged to pass an examination in order to be appointed to positions in the service. The rest of the national

<sup>1</sup> People *ex. rel.* Killeen v. Angle, 109 N. Y., 564; People v. Durston, 6th Report of the N. Y. Civ.-Serv. Com., 231.

<sup>2</sup> The United States law is to be found in 27 Stats. at Large, 403, c. 27; the New York law is L. 1883, c. 354; the Massachusetts law is L. 1884, c. 320; and the rules and regulations of the commissions may be found in any of the reports of the commissions.

service is at the disposition of the President, who may require such intellectual or other tests for entrance into the service as he deems best. Up to the present time, however, the President has thought best to classify for examination only five branches of the service. These are, first, the "classified departmental service." The name is derived from the fact that the old classification of 1853, to which allusion has been made, has been extended practically to all subordinate positions at Washington in the eight executive departments, the civil-service commission, the department of labor, and the fish commission. In the department of agriculture are included also the employees of the weather bureau employed elsewhere than at Washington.<sup>1</sup> The second class is the "classified customs service," which embraces those persons similarly classified and serving under any collector, naval officer, surveyor, or appraiser in any customs district where the officials are fifty or more in number. In this class are included all appointments to which is attached a salary of \$900 or over.<sup>2</sup> The third class is the "classified postal service," which is composed of those officers and employees in the postal service who are appointed under any postmaster of a free-delivery post-office.<sup>3</sup> The fourth class is the "classified railway mail service," which includes all officers and employees in the railway mail service.<sup>4</sup> The fifth class is the "classified Indian service," which embraces all physicians, school superintendents, and assistant superintendents, school

<sup>1</sup> Department Rules I.-IV. ; 9th Report of the United States Civil-Service Commission, 64. For an interesting article on the general subject see F. P. Powers on "The Reform of the Federal Service" in *Pol. Sci. Qu.*, vol. III., 260.

<sup>2</sup> Customs Rule I.

<sup>3</sup> Postal Rule I, sec. 2.

<sup>4</sup> Railway Mail Rule I.

teachers and matrons in the Indian service.<sup>1</sup> It is to be noted that in all these classes the rules exempt from the passage of examinations for appointment to the service one private secretary for each head of an office or bureau where such head is appointed by the President and confirmed by the Senate, custodians of money for whom another is responsible with certain exceptions—*i. e.* those below the grade of assistant cashier or assistant teller,—disbursing officers who give bonds, deputies and assistants not assigned to ordinary administrative work, chief clerks and clerks of divisions, superintendents and assistant superintendents, except in the Indian service, and persons employed exclusively in the secret service.<sup>2</sup> Care is taken in the rules, it will be noticed, to prevent an unduly wide interpretation being put by appointing officers on the scope of these exemptions. The result of the exemption of the chiefs of divisions has been unfortunate. It is said that the position of the chief of division has become rather a precarious one and is filled now with less efficient persons than formerly, and filled in most cases for partisan political reasons. The demand for places has been so great and the number of places to be distributed so small, as a result of the enforcement of the civil-service law and rules, that the positions of chiefs of divisions have been used to reward political services.<sup>3</sup> The main reason why these exemptions have been made is to be found in the desire to secure perfect harmony and confidence between the officers exempted and their

<sup>1</sup> Indian Rule I. ; see 7th Report of the U. S. Civil-Serv. Com., 79-89 ; 9th *Ibid.*, 64-70.

<sup>2</sup> See Departmental Rule II., sec. 3 ; Customs Rule II., sec. 5 ; Postal Rule II., sec. 5 ; Railway Mail Rule II., sec. 5.

<sup>3</sup> See F. P. Powers on the "Reform of the Federal Service" in the *Pol. Sci. Qu.*, III., 278.

superiors. It is believed that this harmony will result from a uniformity in political opinions as well as from purely personal reasons. The total number of those in the "classified services" is said to be about 43,000.<sup>1</sup>

Both New York and Massachusetts have followed the example set by the national government and have classified their services, both the central service and the service of the cities, for the purpose of providing tests for the ascertainment of the intellectual capacity of the candidates for office. They have further followed in the main the same principles in exempting the Senate appointments and laborers, with the one exception that Massachusetts has provided a means of forming a register of persons desiring positions as laborers, from which the appointing officers are to select laborers when wanted. It is reported very recently that such a registration of laborers has been adopted by the United States navy department for the navy yards. The classification in both commonwealths had on account of the greater heterogeneity of the services to be made on quite a different plan.<sup>2</sup>

For the purpose of attending to the examinations which the law intended to establish and generally of enforcing the provisions of the civil-service acts there has been established both in the national and the commonwealth service a commission of a non-partisan character to be appointed by the chief executive with the consent of the Senate or council and generally removable by him alone.<sup>3</sup> Under this commission is a chief examiner whose duty is, under the direction of

<sup>1</sup> 9th Rep. of the Civ.-Serv. Com., 97.

<sup>2</sup> For the details see the various reports of the commissions.

<sup>3</sup> U. S. Stats. at Large, vol. 22, c. 27, p. 403; N. Y. L. 1883, c. 354; Mass. L. 1884, c. 320. The Massachusetts law requires the assent of the council for the removal as well as for the appointment.

the commission, to secure uniformity and justice in the action of the various examining boards. These examining boards are to be designated from among officers in the public service, after consultation with the heads of departments, by the civil-service commission. They may hold their examinations at the capital or elsewhere. Any fraud on their part or on the part of any person in the public service in conducting the examinations is to be punished. The composition and the duties of these boards are defined in the regulations of the commissions; and the commission will consider complaints as to the unfairness of any board and will revise the marking or grading and will order a new examination if it thinks best.<sup>1</sup>

In the cities in New York there are special commissions whose composition varies considerably as they are formed in accordance with the rules which the mayors of the cities have the right, subject to the approval of the commonwealth commission, to issue.<sup>2</sup> This power of approving the municipal rules is about the only power of control which the central commission has over the municipal service. The Massachusetts law differs from the New York law in that it puts the control of the municipal as well as that of the commonwealth service into the hands of the commonwealth commission.<sup>3</sup>

The examinations, to conduct which is the chief purpose of the formation of these commissions, are either pass or competitive examinations. The former, *i. e.* the pass examinations, are sometimes called standard or non-competitive examinations. They were introduced

<sup>1</sup> U. S. Reg. VI. ; N. Y. Reg. 15 ; Mass. Reg. 13.

<sup>2</sup> N. Y. L. 1884, c. 410, sec. 2.

<sup>3</sup> Mass. L. 1884, c. 320, sec. 2.

into the national administrative service in 1853 but have now for the most part been replaced by the competitive examinations. Pass examinations occur for positions under the civil-service rules only in exceptional cases. Such cases are where there has been a failure of competent persons to attend and be examined and where the subjects in which the examinations are to be held are of a technical character or require peculiar information and skill.<sup>1</sup> We find such pass examinations in the patent office, the state department, the pension office, the signal office, and the geological survey.<sup>2</sup> In addition to the places which fall under the operation of the general civil-service rules we find pass examinations held also in other branches of the service, where they have been provided by executive or departmental regulations, *e. g.* in the revenue marine service and in the United States hospital service.<sup>3</sup>

In the New York service these pass examinations occur more frequently than in the United States national or even in the Massachusetts service. The reason of the greater frequency was that in the opinions of the heads of the departments the competitive examinations were unsuited for many of the positions, *viz.*, expert positions<sup>4</sup> and the lower grades of employees.<sup>5</sup> Thus in the case of expert positions the appointing officer is allowed a wide discretion. He may, first, select from three persons marked highest as the result of a competitive examination; or second, he may name to the commission three or more persons for

<sup>1</sup> See U. S. Gen. Rule III. which makes some other less important exceptions to the rule of competitive examinations, in order to facilitate the transaction of business in the departments.

<sup>2</sup> See 7th Rep. U. S. Civ.-Serv. Com., 87.

<sup>3</sup> See Comstock, *op. cit.*, 578 and 583.

<sup>4</sup> N. Y. Schedule C.

<sup>5</sup> N. Y. Schedule D.



competitive examination; and appoint the one graded highest in such examination; or third, he may appoint any person who upon a pass examination shall be duly certified to him by the commission as qualified for the duties of the position. This third method, *i. e.* the pass examination pure and simple, is always used for the lower grades of employees.<sup>1</sup>

The competitive examinations may be either open or limited. In the national service the competitive examinations are in nearly all cases open examinations, *i. e.* open to all comers otherwise duly qualified, and in general are written examinations. In the national service further these open competitive examinations are either limited or general in scope and are called copyist examinations or clerk examinations, the former admitting the applicants only to the lower grades of the service.<sup>2</sup> The subjects upon which the copyist examinations are held are orthography, penmanship, arithmetic. The clerk examinations are on the additional subjects of book-keeping, accounts, elements of the English language, letter writing, elements of the geography, history, and government of the United States. In addition to the copyist and clerk examinations there are what are called supplementary examinations which are held for places requiring certain technical, professional, or scientific knowledge or acquaintance with some other language than English.<sup>3</sup> The character of the open competitive examinations in the commonwealth service is similar to that of the national open competitive examinations.<sup>4</sup> In New York

<sup>1</sup> N. Y. Schedule D. See N. Y. Rules 25-28.

<sup>2</sup> United States Departmental Rule II.

<sup>3</sup> See 7th Rep. of the U. S. Civ.-Serv. Com., 39, 231.

<sup>4</sup> See 6th Rep. of the N. Y. Civ.-Serv. Com., 464.

in addition to the open competitive examinations there are also limited competitive examinations, *i. e.* limited to those persons who may be designated by the head of a department wishing to make the appointment.<sup>1</sup> But for most of the clerical service under the rules<sup>2</sup> the examinations are open competitive examinations.

Both the national and commonwealth civil-service laws provide that the examinations shall be practical in character and, as far as may be, shall relate to matters which will fairly test the relative fitness and capacity of the persons examined to discharge the duties of that branch of the service into which they wish to enter. On account of this provision it will be seen that in many cases the applicant will have to state in advance the branch of the service into which he wishes to enter, and that an examination which, if passed satisfactorily, will open entrance into one branch of the service, will not open to him entrance into another. This is essentially true of the New York service which is of an extremely heterogeneous character.<sup>3</sup>

All applicants who pass satisfactorily the open competitive examinations (seventy per cent. in both the national and New York service, sixty-five, in the Massachusetts service, in all cases an exception being made for honorably discharged sailors and soldiers of the United States<sup>4</sup>) are placed on an eligible list on which they may remain a year, and when a proper vacancy occurs, the commission certifies to the appointing officer a given number, *viz.*, three, standing highest on the

<sup>1</sup> See *supra*, II., p. 41.

<sup>2</sup> N. Y. Schedule B.

<sup>3</sup> See 6th Rep. of the N. Y. Civ.-Serv. Com., 464 *et seq.*

<sup>4</sup> U. S. Dep. Rule VI., 2 and 3; Customs Rule III., 3 and 4; Postal Rule III., 3 and 4; Railway Mail Rule III., 3 and 4; Indian Rule III., 5; N. Y. Rule, 15; Mass. Rule xxviii.

list, and from these the appointing officer makes his choice. In both the national and the commonwealth service, honorably discharged sailors and soldiers of the United States are to be preferred, in some cases even to those standing higher than they, if they have been able to obtain the required minimum mark. The appointing officer has not been confined in his choice to the candidate standing highest on the list, because it was feared that this might be regarded as an unconstitutional limitation of his discretion. The United States attorney-general has held that it is not unconstitutional to confine the choice of the appointing to the four standing highest on the list of eligibility.<sup>1</sup> No person, it may be added, may in most cases be certified more than three times to the same appointing officer, except at the request of the appointing officer. This provision was adopted to prevent the commissions from forcing upon an appointing officer any person who was personally objectionable to him. The appointment is not yet, however, a complete one. All that the applicant has shown is a certain amount of theoretical knowledge. He is now put upon his probation, as it is called, and only at the end of the term of probation, and then only if he has shown practical aptitude for the place, is he given a permanent appointment. The term of probation is six months in the United States and Massachusetts, and three months in New York.

What has been outlined is the strict system which the laws and the rules as a whole aim to enforce. But it is to be noticed that the rules contain detailed provisions which allow the appointing officers in certain

<sup>1</sup> Opinions Attorneys-General, XIII., 516.

cases a greater discretion than would appear from this general outline. These provisions, while permitting dispensing with the rules in certain cases, are, however, intended to be framed so as to prevent such a use of the discretion given as to destroy the effect of the open competitive examination system. A further qualification provided for by section 9 of the United States civil-service law is that where two or more members of the same family are in the public service in the grades covered by the act, no other member of the same family shall be eligible for appointment to any of the said grades.

It will be noticed that in almost all cases where the American law has attempted to secure mental capacity in the positions which are to be filled by appointment, it has done so by means of a competitive examination and a term of probation. Only in a few cases, as in position of medical reviewer in the pension office,<sup>1</sup> where professional knowledge is necessary, is a regular training and course of study required. The result is necessarily that those persons run the best chance for preliminary appointment to most of the positions for which qualifications of capacity are required, who can "cram" the best. The disadvantage of such a method, it is attempted to overcome by providing that the examinations shall be of a practical character, and shall relate to the work of the office to which the appointment is sought; that entrance to the lower positions alone shall be obtained in this way, and finally that after the passing of the examination and the preliminary appointment, the applicant for appointment, or "probationer" as he is called, shall not be

<sup>1</sup> Comstock, *op. cit.*, 587.

considered as having a permanent appointment until he shall have proved by actual practice that he is fitted to discharge the duties of the position he desires to fill. The term of probation is, however, comparatively short, particularly in the New York service. With a term of probation so short the examinations are the most important test; and these evince theoretical rather than practical aptitude. It is on this account probably that those who have been advocating the civil-service-reform movement, as this method of filling the positions in the administrative service is popularly designated, have not attempted to extend the system beyond the lowest grades of positions. It is well that they have taken this position, for it is very doubtful if an examination is a proper method of showing capacity for places whose duties are at all discretionary in character.

### *III.—Qualifications for office in France.*

1. *General qualifications.*—The qualifications necessary for appointment to office in France are fixed for the most part by executive decrees and departmental regulations but not often by law except in the case of some of the general qualifications. These general qualifications are citizenship, which is usually required for all appointive offices; a certain age which is so fixed as to ensure the entrance of candidates into the service at an early age and gradual rise by promotion to the higher grades of the service; and good character. This qualification is somewhat the same as that provided by the United States civil-service rules but a little more stringent.<sup>1</sup>

<sup>1</sup> See Penal Code, arts. 34, 35; Block, *Dictionnaire, etc.*, 974.

2. *Qualifications of capacity.*—In the purely technical and professional branches of the service the qualifications consist in passing successfully through the schools established by the government for the purpose of educating men for these branches of the service. Thus engineers must be educated at the school of bridges and roads, mining engineers at the school of mines, *etc., etc.*<sup>1</sup> In most of the ordinary administrative services, however, great reliance is placed upon the passage of open competitive examinations. But much greater reliance is placed than in the United States on the possession by the candidate for office of a good general education which is evidenced by certain diplomas or certificates. The diplomas most commonly required are those of bachelor of letters and science, while for those positions which require a knowledge of the law the diploma of licentiate in law (about equal to the usual degree of bachelor of laws in the United States) is necessary and in some cases the highest degree in law, *viz.*, that of doctor, is required. It is to be remembered that the degrees of licentiate and doctor of laws are given only to those persons who have had a good secondary education. The degree of bachelor of letters is required for positions in the central administration of the treasury, in the department of foreign affairs and the diplomatic and consular service, and in the departments of war and agriculture. The degree of licentiate in law is necessary to obtain the position of chief of bureau in the department of justice and in the general inspection of the finances and for certain positions in the diplomatic and consular services. Where such diplomas are re-

<sup>1</sup> Block, *loc. cit.*

quired they must be submitted for examination at the time of application for entrance into the service when the competitive examinations supervene. All the examinations are conducted by officers in the departments into which entrance is sought and are under the supervision of the heads of the departments. There is no civil-service or examining commission. Similar examinations are held for entrance into the services of the localities.<sup>1</sup> Finally the French place much greater reliance than does the system in the United States upon the term of probation. The length of the term is much greater usually than in the United States, often being as long as two years, and its length often depends on the number of vacancies and the merit of the probationer. The candidate in many cases is not given any salary during the term and often has to prove to the satisfaction of the administration he has sufficient means to support himself during his novitiate.<sup>2</sup>

What has been said refers alone to the subordinate positions of the service. The higher positions which, as in the United States are regarded as in the main political, are not subject to any qualifications of capacity.<sup>3</sup> The appointing power has absolute discretion in the filling of these positions.

#### IV.—*Qualifications for office in Germany.*

1. *General qualifications.*—Among the general qualifications for offices filled by appointment in Germany are citizenship, which, however, is in many cases obtained by the appointment<sup>4</sup>; good character, generally

<sup>1</sup> For the details as to the French system see Métérié-Larrey, *Les Emplois Publics*, 8 et seq., 15 and 83.

<sup>2</sup> Métérié-Larrey, *op. cit. passim*.

<sup>3</sup> Block, *Dictionnaire*, 975, sec. 23.

<sup>4</sup> De Grais, *Verfassung und Verwaltung, etc.*, 1883, 69.

more stringent than in the United States<sup>1</sup>; age, which varies for the different branches; and fulfilment of military service or proof that the candidate is physically unfit for military service.

2. *Qualifications of capacity.*—The qualifications of capacity differ in accordance with the two great divisions of the service, known as the higher and the subaltern service.<sup>2</sup> The higher service in Prussia, upon whose system the imperial system is based so that the Prussian system may be taken as a type, embraces five classes of officers, beginning with the under secretaries of state and ending with the position of inspector.<sup>3</sup> For the purpose of determining the qualifications necessary for appointment to the service the higher service may be divided into the general higher service and the special or technical higher service, the last of which is composed of officers such as mining engineers, *etc., etc.* The general higher service includes such positions as that of under secretary of state, heads of bureaus, provincial governors, “government presidents” and councillors, and the professional members of the important administrative authorities and courts.<sup>4</sup> The purpose of the required qualifications for entrance into the higher service is to bring into the service at an early age men who possess wide general culture and special knowledge of legal and political science. In detail the provisions are as follows: In the first place a good secondary education must have been had, then

<sup>1</sup> Loening, *Deutsches Verwaltungsrecht*, 120; Von Rönne, *Staatsrecht der Preussischen Monarchie*, 4th Ed., III., 146, note 4, referring to certain instructions issued to appointing officers in Prussia in 1817, and providing that no persons of known bad character shall be appointed to positions in the service.

<sup>2</sup> Von Rönne, *op. cit.*, sec. 256.

<sup>3</sup> De Grais, *op. cit.*, 74.

<sup>4</sup> See *supra*, I., pp. 304, 307.



a course of three years' study of law at some university, half of which must have been at a German university. Proof of such study must be submitted to one of the higher courts which proceeds through a commission to examine the candidate. The examination is both oral and in writing, and is upon the private and the public law, legal history, and the principles of political science. The candidate must also write an original dissertation on some legal subject, the general character of which he may select. He is allowed six weeks in which to do this work and must prove to the satisfaction of the examiners that the work is his own. The examination is held after the dissertation has been accepted; and if the candidate is unsuccessful he will be given another opportunity to try after the expiration of six months, but if he is a second time unsuccessful he is forever shut out of the higher service. For the successful candidate the passage of the examination marks the beginning of the period of practical training. For he is at once assigned to work with some one of the higher courts. If a candidate for the judicial service, he works here for four years, if a candidate for the higher administrative service, he works for two years with the court and is then assigned to work for another two years with some administrative authority. During his connection with these authorities the law requires the presiding officer to devote his personal attention to the instruction of the *referendarius*, as the candidate is called, expressly forbids such presiding officers from making use of the *referendarii* simply to aid him in his labors, and requires that the work that is assigned to them shall be such as will best fit them for their future work. The presiding officer must keep a

record of the conduct of the *referendarii* under his charge. At the end of this long period of probation the candidate, if his work has been satisfactory, is to present himself for the final examination which is known as the great state examination and which is conducted by the "Examining Commission for Higher Administrative Officers." This sits at Berlin and is under the direction of the state ministry. The examination is both oral and in writing and is on the law in force in Prussia, especially the constitutional and administrative law, and on political economy and the science of finance; and like all the examinations in the Prussian system is a pass examination. The *referendarius* who passes successfully the great state examination is then appointed to be governmental assessor, is assigned to some salaried position in the higher administrative service, and is eligible to the highest positions in the service. The only great differences between the qualifications required for the general service and those required for the special services, such *e. g.* as positions in the forest or mines administration, are that the examinations for these latter services are upon rather more technical subjects, that university study is not so commonly required, and that the period of practical training required is a longer one.<sup>1</sup>

The subaltern service is divided into the subaltern service proper and the subordinate service. The former embraces those positions, such as the higher clerkships, whose duties require the exercise of a certain amount of legal knowledge and the exercise of a certain amount of discretion, while the purely subordinate service includes simply the purely mechanical positions,

<sup>1</sup> For the details see Von Rönne, *op. cit.*, III., 432-451.

such as copyists, porters, and the like. Provision is made by law for the filling of most of the positions in the subordinate service with persons who are provided with military certificates. These are given to soldiers and sailors who have been invalided, or have served for twelve years in the army as non-commissioned officers. In fact the purely mechanical positions are reserved exclusively for such persons. Further one half of the positions in the subaltern service proper which do not require technical or scientific training are also reserved for persons with the military certificates, who, however, have to pass examinations where these are necessary. All other positions in the subaltern service are filled by means of the "civil supernumeriat." Entrance into the service as civil supernumerary requires the fulfilment of military duty, ability to support oneself without pay for three years, a certificate from one of the well recognized schools for secondary education such as the gymnasium (*Zeugniß der Reife für Prima*), and an age of between eighteen and thirty years. *Referendarii* may, however, enter the subaltern service.<sup>1</sup> All other persons desiring to enter the subaltern service must serve a term of probation termed a novitiate and pass an examination of a practical character at its expiration.<sup>2</sup>

#### V.—Qualifications for office in England.

As a result partly of legal provisions but more of practice the English administrative service is divided into two great divisions, *viz.*, the political service and the permanent service.

1. *The political service.*—This embraces the ministers

<sup>1</sup> Cf. Von Rönne, *op. cit.*, III., 451-4.

<sup>2</sup> *Ibid.*, 452.

and the parliamentary under-secretaries of state and is composed of from fifty to sixty persons who go out of office with each change of administration. The qualifications for this branch of the service are of a purely practical character. That is officers must not be too old to do their share of the work in Parliament and must in the nature of things have a good education and a sufficient knowledge of departmental routine to represent the ministry in Parliament, and finally must be tolerably sure of their seats in Parliament, of which they are members.<sup>1</sup>

2. *The permanent service.*—All the rest of the service has a tenure practically during good behavior, but the manner of appointment and the legal or practical qualifications for the positions in this part of the service vary greatly as a result of the fact that it is divided into many divisions. The first division to be noticed is that class of officers who are known in the English political system as “staff appointments.” These consist of the permanent under-secretaries of state, commissioners, law clerks, *etc.*, *etc.* They are really the most important officers for the routine work of the departments and form the bond of union between the changing ministries and the permanent lower service. They are often spoken of as the “depositories of official tradition,” and are the indispensable advisers of the political service. While appointed generally for political reasons, there being no legal qualification generally for the positions,<sup>2</sup> at the same time great care is taken to obtain capable men and their terms of office are practically for life.<sup>3</sup> Under the present

<sup>1</sup> Gneist, *Das Englische Verwaltungsrecht, etc.*, 1884, 241. <sup>2</sup> Todd, *op. cit.*, I., 616.

<sup>3</sup> Cf. Gneist, *op. cit.*, 241; Anson, *op. cit.*, II., 199–201.

scheme of classification the higher permanent service ends with these staff appointments and clerks of the higher divisions are often promoted to these positions.<sup>1</sup> The second division of the permanent service is to be found in the clerks of what is known as the higher division. It is to be noted, however, that in addition to these and in distinction from them should be mentioned expert and professional positions such as clerks in the office of the solicitor of customs and in the office of criminal law accounts, appointments to such positions being the result of the passage of open competitive special examinations.<sup>2</sup> Positions in the higher division are quite responsible and the exercise of the duties of the office often requires the exercise of considerable discretion. Persons desiring appointment in this division first pass a preliminary test examination open to all comers between eighteen and twenty-four years of age on such elementary subjects as arithmetic, English composition, geography, and English history.<sup>3</sup> After passing such examination satisfactorily, they are eligible for the competitive examination which is intended to be of a character to suit young men from eighteen to twenty-three years of age trained at a good school or at one of the universities. The examination is on a small number of obligatory subjects selected by the candidate from a list prepared by the civil-service commissioners in consultation with the heads of departments. The subjects include history, literature, natural science, mathematics, mental and moral philosophy, jurisprudence, and political economy, and bear little relation to the duties of the office ap-

<sup>1</sup> Crawley, *Handbook of Competitive Examinations*, 6.

<sup>2</sup> See Crawley, *op. cit.*, 57 *et. seq.* and 81.

<sup>3</sup> *Ibid.*, 45.

pointment to which is sought. The greatest weight is laid upon mathematics and natural science and the examination is intended simply to show proficiency in matters of general education. The successful candidates are placed on a list in alphabetical order and may subsequently pass on other subjects on the list, which fact is then to be noted against their names.<sup>1</sup> As vacancies occur the heads of departments are to select whom they wish from the list. Candidates may refuse the place offered and may notwithstanding remain a certain time on the list. After appointment in this way the candidate is put on probation for a year and if satisfactory will then be appointed permanently.<sup>2</sup> This method of filling the higher clerkships is regarded by many as unsatisfactory as laying too much stress on mere theoretical knowledge; and indeed the examinations are so difficult that not so many candidates present themselves as were expected.<sup>3</sup>

The vast body of mere clerks are to be found in what is known as the lower division. Their duties are simply to carry out intelligently the orders of their superiors. It is not the intention to permit the promotion of any such persons to the higher division.<sup>4</sup> The qualifications for appointment to positions in this division are practically the same, with the exception that the examinations are easier and that the appointing officer is confined in his choice to the one marked highest on the list of eligibles. The head of a department may however demand some special qualifications as *e. g.* the ability to read some foreign language. The

<sup>1</sup> *Ibid.*, 46.

<sup>2</sup> *Ibid.*, and Order in Council, Feb. 12, 1876, sec. 10.

<sup>3</sup> See *Nineteenth Century*, October, 1886.

<sup>4</sup> Order in Council, Feb. 12, 1876, sec. 18.

term of probation is the same, *viz.*, a year, and if the probationer is unsatisfactory in one department he may be given another trial in another department for which it is believed he is better suited. The limits of age for the lower division are from seventeen to twenty except in the case of boy clerks. These are admitted at the age of fifteen to seventeen by passing a competitive examination of a very limited character. After good service they may compete among themselves for a limited number of the clerkships in the lower divisions and those who are unsuccessful in obtaining appointment are to be dismissed from the service at the age of nineteen.<sup>1</sup> Finally competitive examinations are also held for the position of copyist.<sup>2</sup>

Finally it is to be noticed that the expenses of conducting these examinations are defrayed from fees paid by the candidates, which vary from £5 for places in the higher division to 1s. for the boy clerkships; and that the examinations are conducted as in the United States under the supervision of a civil-service commission which is appointed by the executive. As is usually the case in this country laborers are considered a legitimate element of party patronage; and no qualifications, not even registration, are required.

#### *VI.—Comparison of the various plans.*

If we compare the various systems which have been adopted for ensuring intellectual capacity in the incumbents of positions in the government service filled by appointment we find that Germany is the only country which has provided that the incumbents of the most responsible positions shall show any evidence of fitness

<sup>1</sup> See Crawley, *op. cit.*, 48-51.

<sup>2</sup> *Ibid.*, 51.

except such as is to be shown by the purely practical tests of every-day life. In Germany, office-holding, especially in the highest positions, is regarded as a learned profession on a par with the other well recognized learned professions and therefore it is only natural for the Germans to require of the candidates for the highest positions an education and training of the same general grade as that which is required of the lawyer or the physician. In England on the other hand, while no legal requirements are laid down, the practical requirements which are in fact demanded amount to very much the same thing, with the single exception that no weight at all is in the higher positions (*e. g.* the staff appointments) laid upon theoretical training. While it is probable that persons who have passed through the universities or who are learned in the law will more frequently fill these positions than non-university men still these places are open to those who have had nothing more than the most general education. But in England this lack of theoretical training is largely compensated for by the rule that once appointed to any of these higher positions the incumbent will remain there probably all his life, and also by the fact that these positions are regarded as in the ordinary course of promotion though there is no law providing that this shall be the case. The result is that these higher positions are filled in England for the most part by men who are thoroughly conversant with the duties required of them and that a change of ministry has no perceptible effect on the work of the administrative departments, which goes on as before under the direction of the officers occupying the staff appointments. In France also somewhat the same method of filling the higher offices



has been adopted, the only difference being that perhaps considerably more emphasis than in England is laid upon theoretical knowledge and practical administrative experience, in that the positions in the higher service are filled perhaps more frequently by men who have had a legal training and by promotion from the lower grades of the service. Here again it has not been thought best to limit at all the discretion of the appointing power in the filling of the highest positions. In the filling of these positions, political reasons, undoubtedly have large influence. It must also be noted, that the tenure of these positions is not probably so fixed as it is in England, although the retention of a certain proportion of each incumbent's salary in order to form a pension fund for the payment of official pensions<sup>1</sup> makes it more difficult than it otherwise would be to make wholesale removals. As in England and in France, so in the United States, both in the national and the commonwealth services, there are few legal requirements of capacity for the higher positions. Reliance is placed almost entirely upon the wisdom of the appointing officers who, it is supposed, will be guided in their choice by the practical needs of the service, although political reasons are at the same time expected to have a large influence. One fact which makes the requirement of a knowledge of the law almost unnecessary in the American system is the wide opportunity given in the United States for legal instruction, which has resulted in the fact that many if not most of the higher positions in the government are filled by men who have been educated in the law. It has been remarked of the

<sup>1</sup> *Infra*, II., p. 74.

American system of government, that it is a government of lawyers. But different from the other systems the American system has not yet, certainly so far as the higher offices are concerned, developed a permanent tenure. The class of what are deemed political offices reaches down much lower in the administrative hierarchy than in other countries. People almost expect that all positions which require the exercise of any considerable amount of discretion shall be filled with new incumbents by every incoming administration. This tendency has been rather aggravated by the laws known as the term-of-office acts,<sup>1</sup> which fix the term of most of the important offices in the national government at four years. The result is that while the American official has generally sufficient knowledge of the law to enable him to perform his duties with intelligence the frequent changes that are made in the higher positions make it practically impossible to keep in office many persons who are thoroughly acquainted with the details of their work. This is the weak point, from an administrative point of view, of the American system, and reform of this particular weakness seems quite hopeless so long as people have the fear, which they undoubtedly do have, of a permanent force of officials, which is associated in their minds with bureaucratic government.

The differences in the various methods of filling the lower positions of the service are not so marked in the different countries. They all agree in requiring the proof of capacity to be made by the passage of examinations. But while in England and the United States the examination and a short term of probation are the

<sup>1</sup> *Infra*, II., p. 90.

only requirements practically for most of the positions, and while the examinations bear no very close relation to the duties of the office appointment to which is sought, in France and Germany great reliance is placed upon practical work in the departments and examinations are much more closely related to the duties of the various positions, while in addition to the examinations and a long term of probation proof of a good general education is very generally required, *i. e.* the candidates for all but the absolutely mechanical positions must have had an education equal to that obtained in the first two or three years of the ordinary American college. Again the American system differs from the English system in that reliance is not placed upon these examinations on subjects of a general educational character to fill those positions whose duties are at all discretionary in character. This, it would seem, is wise, for it is just here that the examination system does not appear to work with unquestioned satisfaction. Such places should be filled by promotion from the lower grades. This the English system attempts to prevent altogether in its general prohibition of the promotion of clerks in the lower division to positions in the higher division. While unfortunately the rule in the United States does not seem to be to fill the positions of discretion by promotion from the lower positions, it is very probable that the American method, even with its present defects, is superior to the English method of attempting to fill such positions by means of examinations on such subjects as the higher mathematics and natural science. Finally the German system differs from all the others in that the examinations take place after, not before, the term of probation, in that they are

pass and not competitive examinations, and in that the subjects on which they are held seem to relate very closely if not entirely to the duties of the office with which the candidate is supposed to have acquainted himself during his long term of probation. In France also it is to be noted that the examinations are much more practical in character than in England or the United States. While the present movement for the reform of the civil service has been in the main upon the lines of the preceding English reform, it is very probable that we have followed the English example about as far as we can follow it with profit, and it is doubtless either to France or Germany that we shall have to turn in our endeavors further to reform the conditions of entrance into the administrative services. We must not only do this, but also public opinion must be cultivated up to the point at which it is in England, where it will not permit wholesale changes of personnel in the higher branches of the service not wholly political in character.

## CHAPTER IV.

### THE RIGHTS OF OFFICERS.

#### *I.—Right to the office.*

The first right to be noticed is the right of the officer to exercise the powers and perform the duties connected with his office. A continuing right to the office can be spoken of only in the case of an officer whose tenure of office is independent of any administrative superior, so far as the length of term is concerned. Only those officers have a permanent right to exercise the powers and perform the duties of the office who may not be arbitrarily discharged by an administrative superior.<sup>1</sup> But the question of the right of an officer to his office is one which may come up at the beginning of the official relation rather than at the end. It will naturally come up more frequently in the case of elective than in the case of appointed officers, but it may come up in the case of an appointive office especially in the United States, where the term of appointed officers is so often fixed by law. For instance the appointing authority may make an appointment to an office when he believes that the

<sup>1</sup> Thus the remedy by means of which the right may be enforced, *viz.*, the *quo warranto*, may not be made use of in the case of offices of no certain duration. *State v. Champlin*, 2 Bailey, S. C. 220; *Darley v. The Queen*, 12 Clark & Finlay, 520, 541.

term of the incumbent has expired, while the incumbent may claim that the term has not expired and that he has a right to the office until the expiration of its term. In the case of an elective office the question as to the right may come up very frequently as the result of a dispute as to who has been elected. Everywhere this right of the officer to his office is recognized, especially in the case of elective offices; the great difference in the different countries being as to the method by which the right is to be enforced. In England and the United States the rule has been ever since the reign of Queen Anne,<sup>1</sup> that the title to office is to be tried by the writ of *quo warranto*, or the information in the nature of a *quo warranto*, or its statutory substitute, by means of which the courts are to decide who are the rightful holders to offices in question, and as such entitled to exercise their powers and receive their emoluments. Further one who is clearly entitled to an office may by *mandamus* force the delivery to him of the *insignia* of office and may in like manner obtain possession of public buildings and records.<sup>2</sup> In the United States the appeal to the courts is generally open to any candidate for the office, to the government, and in many cases to any elector of responsibility.<sup>3</sup> In some of the American commonwealths special tribunals to try election cases have been established. If this is the case, recourse must be had to such tribunals and not in general to the *quo warranto*.<sup>4</sup> In England

<sup>1</sup> See 9 Anne, c. 20.

<sup>2</sup> *People v. Kelduff*, 15 Ill., 492; *Walter v. Belding*, 24 Vt., 658; *Hooten v. McKinney*, 5 Nev., 194.

<sup>3</sup> See *Commonwealth v. Neeser*, 44 Pa. St., 341; *Commonwealth v. Swank*, 79 Pa. St., 144; *cf. Mechem, op. cit.*, sec. 213.

<sup>4</sup> *State v. Marlow*, 15 Ohio St., 144; *People v. Goodwin*, 22 Mich., 496; see also *People v. Hall*, 80 N. Y., 117, and *cf. Mechem, op. cit.*, sec. 214.

also of late years the tendency has been to establish special tribunals to try election cases, which, however, act under the supervision and to a certain extent under the direction of the ordinary courts of law.<sup>1</sup> Finally in some cases in England election contests are decided by the superior authorities of the administration itself.<sup>2</sup> On the continent access to the ordinary courts to try the title to office is seldom allowed. It is believed such a practice would violate the fundamental principle of the independence of the administration. Generally any dispute as to the title to an office is to be tried by the administrative courts, and the right to appeal against the decision of an election bureau is given not only to the defeated candidate and to the government, but also, as is the case frequently in the United States, to any elector.<sup>3</sup>

## II.—*Special protection.*

The second right of officers is the right to special protection offered by the criminal law. In the United States and England this protection is as a rule extended only to certain classes of officers, *viz.*, those who come in contact with the people as bearers of a direct command of a competent authority to do or not to do some particular thing. Where for the purpose of executing such commands it is necessary for such officers to use force they may do so, and not only are they relieved from responsibility for the damage which they may cause but the law has declared it to be a crime to resist them; and where an armed resistance is offered

<sup>1</sup> Thus see 45 and 46 Vict., c. 50, secs. 77-104.

<sup>2</sup> See for the poor-law union elections, Chalmers, *Local Government*, 57.

<sup>3</sup> For an example see the French law of July 31, 1875, governing the trial of contests relative to the general council elections.

it becomes a very serious matter for the persons who thus offer opposition. These officers are generally to be found among those who have to do with the administration of justice, the collection of revenue, and the exercise of police power. For example the United States Revised Statutes<sup>1</sup> declare resistance to a customs officer in the execution of his duties to be a crime punishable by fine and imprisonment, which, when the offence is aggravated by the use of a deadly weapon, may be as long as ten years. Again the penal code of New York<sup>2</sup> declares a person who attempts by means of any threat or violence to prevent an executive officer, *i. e.*, an executive officer in the large sense of the word,<sup>3</sup> from performing his duty; or a person who does actually make resistance by force or violence to any executive officer in the performance of his duty, to be guilty of a misdemeanor.<sup>4</sup> The offence of offering resistance to officers in the performance of their duties, it will be noticed, is a distinct offence, separate and apart from the simple offence of violating the law which the officer is attempting to enforce at the time when the resistance is offered. The latter offence is an offence against the law itself, while resistance to an officer in the performance of his duty is more in the nature of a personal matter, and the provisions of law in regard to it are intended to protect administrative officers in the discharge of their duties.<sup>5</sup> This protection is accorded to them only during the discharge of their duties. Assault, it would seem, might be made upon them

<sup>1</sup> Section 5447.<sup>2</sup> Sections 46, 47.<sup>3</sup> As defined in section 58.<sup>4</sup> Cf. Gneist. *Das Englische Verwaltungsrecht*, 1884, 384.<sup>5</sup> Cf. *In re Neagle*, 135 U. S., 1, 64-68, where it is held that the President of the United States may provide special protection for United States officers in the discharge of their duties.



after the performance of duties which were objectionable to the public and as the direct result of such performance, when such assault would be regarded as simply the assault of a private person and punishable as such.<sup>1</sup>

In France and Germany while the same protection is granted to public officers as is granted in England and the United States,<sup>2</sup> the law goes a step further and declares that all outrage and violence to public officers, either during the discharge of their duties or as a result of such duties, are punishable.<sup>3</sup>

### III.—Promotion.

In the United States both in the national and the commonwealth services promotion is not usually regarded as a right. For a long time it was looked upon as a new appointment and even at the present time is largely so regarded. In both the national and the commonwealth services the civil-service laws and rules attempt to prevent the positions under the rules from being filled by the promotion of persons appointed to positions not under the rules, and to encourage the filling of some of the higher positions, in what is regarded as the subordinate service, by the appointment of persons in the lower positions,<sup>4</sup> who shall be advanced for other than political reasons.<sup>5</sup> In fact the New York

<sup>1</sup> As, *e. g.*, the assault of President Garfield by Guiteau; but see *In re Neagle*, *supra*, II., 65.

<sup>2</sup> Penal Code, arts. 209-221; *Reichstrafgesetzbuch*, sections 112-114.

<sup>3</sup> Penal Code, arts. 222, 223, with the cases interpreting these articles which may be found in any one of the annotated codes. See the recent prosecution of the Archbishop of Aix for libelling the minister of public worship. *Cf.* Stengel, *Wörterbuch*, *etc.*, I., 141.

<sup>4</sup> See U. S. Law, sec. 7; N. Y. Rule 37.

<sup>5</sup> See N. Y. Rules 32 and 33.

law has formed a special schedule (E) of the higher positions under the rules, entrance to which is confined to the persons occupying positions in the lower grades.<sup>1</sup> Very recently also the national commission has made a tentative step in the same direction by providing rules for promotion in the New York custom-house and in certain of the departments in Washington.<sup>2</sup> Under these rules promotion is if possible confined to the persons in the grades immediately inferior to that to which promotion is to be made, and in the examinations for promotions which are adopted, and which are usually pass examinations, the greatest weight in the marking is laid upon office efficiency. Where such a method is adopted there is something in the nature of a right to promotion, a right which is possessed only by those in the grades immediately inferior to the grade to which the promotion is to be made. But this claim, if we may call it so, is so indefinite that it may not with propriety be called a right.

In the other countries the rules are somewhat the same as in the United States, promotion being regarded generally as a new appointment. But in many instances, within each grade there are classes to each of which a different salary is attached and transfer from one class to another within the grade is usually made as a result of seniority of service.<sup>3</sup> In England this method has been carried the farthest. Thus in the lower division clerkships the salary commences at £80 and rises by triennial increments of £15 to £200.<sup>4</sup>

<sup>1</sup> N. Y. Rule 31.

<sup>2</sup> 7th Report of the Commission, 74, 79; 9th *Ibid.*, 60-63. So also in some cases in Massachusetts, Rule xliii.

<sup>3</sup> For France see Block, *Dictionnaire, etc.*, 985.

<sup>4</sup> Order in Council, Feb. 12, 1876, cited in Crawley, *op. cit.*, 912.

IV.—*Compensation.*

1. *Not a contractual right.*—The fourth right of importance possessed by the official is the right to the payment of a compensation. This right is not, however, a contractual right, since the official relation is not a contractual relation. If the right to compensation exists at all it exists as the result not of a contract or by virtue of any service rendered to the government but because the law has attached the compensation to the office.<sup>1</sup> A person who accepts office to which no compensation is attached by law is presumed to undertake the office gratuitously<sup>2</sup> and cannot recover anything on the ground of an implied contract to pay what the service is worth.<sup>3</sup> The rule is otherwise where a person undertakes to render service to a municipal corporation at its request not as a public officer but as a private agent.<sup>4</sup> It has been held that such an agent may be a public officer provided that the service he renders is absolutely foreign to the office which he holds.<sup>5</sup>

The official relation, not being a contractual relation, and the existence of the right to compensation being dependent upon the law, we must go to the law to find if there is a salary attached to any given office. As a general rule it is true that a salary or compensation is

<sup>1</sup> *Fitzsimmons v. Brooklyn*, 102 N. Y., 536, 539; *People v. Police Commissioners*, 114 N. Y., 245, 247.

<sup>2</sup> *State v. Brewer*, 59 Ala., 130.

<sup>3</sup> *Goddard v. Petersham*, 136 Mass., 235; *White v. Levant*, 78 Me., 568; *Talbot v. East Machias*, 76 Me., 415; see also *Sikes v. Hatfield*, 13 Gray, Mass., 347.

<sup>4</sup> *Lindabury v. Freeholders*, 47 N. J. L., 417; *Detroit v. Redfield*, 19 Mich., 376; *Converse v. U. S.*, 21 How. U. S., 463.

<sup>5</sup> *Ibid.*, *Evans v. Trenton*, 24 N. J. L., 764; but see *Sedway v. Commissioners*, 120 Ill., 496.

attached by law to all the positions in the national service of the United States.<sup>1</sup> The same rule is true of the central commonwealth service, though there are more exceptions to the rule. In the local commonwealth services it is also the rule though the exceptions become much more frequent. As a general rule the compensation is fixed by statute. In the national service this is especially true. In the statutes we find in connection with each position of any importance a statement of what is its salary. For the clerical service in the departments at Washington we find a regular classification of salaries which was made in 1853. In the commonwealths the salaries of the important positions are fixed by statute, but here more frequently than in the national service, where it is sometimes the case, the salaries are fixed by departmental regulations with the result of a great lack of uniformity in the salaries of persons doing the same kind of work in different departments. The compensation, however it may be fixed, may be changed by the authority fixing it, provided no higher law, such as the constitution when it is fixed by statute or the statutes if it is fixed by departmental regulation, prevents.<sup>2</sup> It may be altered, diminished, or altogether terminated during the term of office of the incumbent, and such change will not be regarded as impairing the obligation of a contract since the official relation, as has so often been said, is not a contractual relation.<sup>3</sup> But the act chan-

<sup>1</sup> There are a few exceptions to this rule, as *e. g.* the board of Indian commissioners, U. S. Rev. Stats., sec. 2039.

<sup>2</sup> *Kahn v. State*, 93 N. Y., 291.

<sup>3</sup> *Butler v. Pennsylvania*, 10 How. U. S., 402; *Koratz v. Franklin Co.*, 76 Pa. St., 154; *Wyandotte v. Drennan*, 46 Mich., 478; *Conner v. Mayor*, 5 N. Y., 285.

ging the compensation must be clear and explicit. Thus the mere appropriation of a sum of money less than the salary does not have the effect of changing the compensation<sup>1</sup> unless the legislature says expressly that the new appropriation shall be full compensation.<sup>2</sup> It is, however, a very common provision in the United States commonwealth constitutions or statutes that the salary or compensation shall not be increased or diminished during the term of office of the incumbent.<sup>3</sup> If, however, the services have been rendered, a contract to pay for them at the rate fixed by law is implied, which cannot be impaired even by the legislature.<sup>4</sup> A further result of the fact that the official relation is not a contractual relation is that the incumbent does not lose his right to his compensation by reason of his inability, as *e. g.* from sickness, to discharge the duties of the office. So long as he holds the office he has the right to the compensation.<sup>5</sup> Finally if he is illegally prevented by his superiors from discharging his duties, as by an unauthorized removal, he still does not lose his claim to his compensation, and is not obliged to deduct from his salary what money he earns during the period of his absence from duty.<sup>6</sup>

2. *How fixed in amount.*—The amount of the salary attached to the office may be fixed or may depend on the amount of business done in the office, *i. e.*, may consist wholly or partly of fees. The latter method is very common in the consular and customs services of

<sup>1</sup> U. S. v. Langston, 118 U. S., 389; State v. Steele, 57 Tex., 200; People v. McCall, 65 How. Pr., 442.

<sup>2</sup> U. S. v. Fisher, 109 U. S., 143; U. S. v. Mitchell, *Ibid.*

<sup>3</sup> See Stimson, *American Statute Law*, sec. 214; Mechem, *op. cit.*, sec. 858; *cf.* for the compensation of the President, U. S. Const., Art. II., sec. 1, par. 7.

<sup>4</sup> Fisk v. Police Jury, 116 U. S., 131; Stewart v. Police Jury, *Ibid.*, 135.

<sup>5</sup> O'Leary v. Board of Education, 93 N. Y., 1.

<sup>6</sup> Fitzsimmons v. Brooklyn, 102 N. Y., 536; Andrews v. Portland, 79 Me., 484.

the national government and in the local offices in the commonwealths. The advantage of the fee system consists in the fact that the salary or compensation is paid under it by those persons who make use of the office to which the fees are attached. Its disadvantage is to be found in the fact that on account of the smallness of the fee usually required, extortion is not unfrequently practised by officers and submitted to by the public, notwithstanding the most stringent penal provisions that may be passed to prevent it. The compensation actually received is out of all proportion to the work done, and comes to be regarded rather as a reward for political service than as a compensation for work done. On this account the tendency at present is to replace fees by fixed salaries. Another method of fixing the amount of the compensation is to pay so much for each day's service rendered by the officer. This system of *per diem* allowances, as it is called, is quite common in the localities where the public business is so arranged as to require a great number of officers who shall devote only a part of their time to the public service. Still another method of fixing the amount of the salary is to be found in the national postal service, where the compensation of postmasters is, within certain limits, determined by the receipts of their offices, *i. e.*, by the number of postage stamps sold.<sup>1</sup>

Finally it is to be noticed that the salary or compensation of public officers is from motives of public policy not subject to garnishment or attachment.<sup>2</sup> Nor may a future salary generally be assigned.<sup>3</sup>

<sup>1</sup> U. S. Rev. Stats., secs. 3852-3857.

<sup>2</sup> See *Mechem, op. cit.*, sec. 975; *Buchanan v. Alexander*, 4 How. U. S., 20.

<sup>3</sup> *Bliss v. Lawrence*, 58 N. Y., 442; *Beal v. McVicker*, 8 Mo. App., 202; but see *State Bank v. Hastings*, 15 Wisc., 78, which held the contrary, applying to this public legal relation the rules of purely private law.

3. *How enforced.*—The claim for compensation has been spoken of as a right on the part of the officers. This description of it is not in all cases correct, or has not until quite recently been correct. Where the compensation consists of fees to be paid by third persons employing the official, the officer has an actual right to the payment of the fees as fixed by law and may retain any documents in his possession in or about which he has expended labor until the fees are paid.<sup>1</sup> If paid by the public, however, he cannot recover anything from a third party, even if such third party has promised to pay him.<sup>2</sup>

Where, however, the officer's compensation consists of a salary which is to be paid by the government it would seem that if there is no special law permitting him to sue the government, and if he cannot put his claim into such a shape as to make some one of the various municipal corporations or *quasi* municipal corporations responsible for it, he has in many cases no claim which is enforceable in a court of law. This fact is due to the principle that the government may not be sued without its consent.<sup>3</sup> In the national government, as a result of a special statute, officers may sue the government in the courts for their compensation.<sup>4</sup> In the commonwealths as yet the general rule is that officers may not sue the central government for their salaries. But it must be remembered that many of the officers who are discharging duties which affect

<sup>1</sup> Mechem, *op. cit.*, secs. 887-888; *Baldwin v. Kansas*, 81 Ala., 272; *People v. Harlow*, 29 Ill., 43; see also *Ripley v. Gifford*, 11 Iowa, 367.

<sup>2</sup> *People v. Marble*, 118 Mass., 548; *Hatch v. Mann*, 15 Wendell, N. Y., 44.

<sup>3</sup> *Infra*, II., p. 154.

<sup>4</sup> *Infra*, *Patton v. U. S.*, 7 Ct. of Claims, 362; *U. S. v. Langston*, 118 U. S., 389.

the commonwealth at large, and who are therefore somewhat central in character, are paid by the various local corporations which are subjects of private law and may therefore be sued.<sup>1</sup> Finally if the duty is imposed upon any individual officer, even of the central government of the commonwealth, to pay the legal compensations of other officers, and he should refuse so to do, he might be forced to act by means of the writ of *mandamus*.<sup>2</sup> Thus at the present time the claim of almost every officer in the administrative system to his salary or compensation is enforceable by some sort of judicial proceedings, and may therefore be regarded as an actual right over whose existence and extent the courts and not the administration are to decide as in the case of any other private right.

Somewhat akin to the right to recover compensation is the right which all officers possess to force the payment to them of all the expenses which they have been obliged to incur in order to discharge their duties. This is true whether the expense has been incurred for the government or for an individual.<sup>3</sup>

In some cases pensions or superannuation allowances are included within the compensation. But in the United States this matter has received almost no attention, such allowances being found almost only in the case of certain of the judges of the national courts and in the police and fire departments of the municipalities.<sup>4</sup>

<sup>1</sup> *Infra*, II., p. 152.

<sup>2</sup> High, *Extraordinary Legal Remedies*, 2d Ed., 105; *Turner v. Melvay*, 13 Cal., 621; see also *Nichols v. Comptroller*, 4 Stew. and Port., Ala., 154.

<sup>3</sup> *Powell v. Newbury*, 19 Johns., N. Y., 284; *Andrews v. U. S.*, 2 Story C.C., 202; *U. S. v. Flanders*, 112 U. S., 88.

<sup>4</sup> *E. g.* see N. Y. L., 1882, c. 410, secs. 303-309.



4. *Compensation in other countries.*—In the other countries the rules with regard to salaries are very much the same as here, with the exception that in Germany there are many more absolutely unpaid officers. Further the salaries are regulated in much the same manner, with the exception that in France and Germany the salary of central officers is usually composed of two quite separate portions, one of which, *viz.*, that which is regarded as the compensation for the work done being everywhere throughout the country the same for the same work, the other varying with the locality in which the office is situated in accordance with the expense of house rent. This is often called the indemnity of residence.<sup>1</sup> Payment of the salary may in France be enforced by appeal to the administrative courts which have sole jurisdiction over this matter,<sup>2</sup> in Germany by appeal to either the ordinary judicial or the administrative courts, which have concurrent jurisdiction of the matter,<sup>3</sup> and in England by means of the petition of right when the claim is against the central government, or by suit when against the local corporations.<sup>4</sup>

5. *Civil pensions.*—In all these countries, however, the compensation includes a claim to a superannuation allowance. These superannuation allowances or pensions for civil officers seem first to have been introduced into France, and the method adopted there has in its main features been adopted in both Germany and England. The most important law regulating this matter in France is the law of June 9, 1853. By this

<sup>1</sup> *E. g.* see Block, *Dictionnaire, etc.*, 978, c. xi.

<sup>2</sup> Laferrière, *La Juridiction Administrative*, II., 186.

<sup>3</sup> Schulze, *op. cit.*, I., 338.

<sup>4</sup> *Infra*, II. p. 154.

law the right to the pension is acquired by the attainment of sixty years of age and after thirty years of service. These limits are reduced in exceptional cases to fifty-five and twenty-five respectively. The amount of the pension is based on the average salary for the last six years of service ; one sixtieth of such average salary being granted for each year of service up to a maximum of forty-five sixtieths. Further, in order to prevent the budget from being too heavily burdened the law provides that new pensions may be granted each year only in so far as old pensions have been extinguished during the preceding year. No officer, therefore, may at any given time demand that his pension be given him even if he is sixty years of age and has served for thirty years. He must wait until an old pension has been extinguished. These pensions are paid partly out of deductions made from the salaries of officers and partly from appropriations made by the legislature. The deduction usually made is five per cent. of the salary. Finally the widow and children of a pensioner are granted certain claims also under this law. All questions relating to the pensions, *i. e.*, as to the amount, and the fulfilment of the necessary conditions for obtaining the pension are decided by the administrative courts.<sup>1</sup>

In Germany the main principles are the same. The only marked exception is that only ten years of service after the twenty-first year of age are required, when the pensioner would receive fifteen sixtieths of the last salary and one sixtieth for every additional year. But, as in France, the maximum pension obtainable is forty-five sixtieths and the age at which the pension is

<sup>1</sup> Laferrière, *op. cit.*, II., 190.

granted is sixty-five.<sup>1</sup> Pension claims are decided by either the ordinary judicial courts or by the administrative courts.

In England superannuation allowances are regulated by several statutes, the most important of which is 22 Vict. c. 26 which does not, however, apply to all branches of the service. By this law the pension is acquired, as in Germany, by ten years of service when ten sixtieths of the last salary are given, and rises one sixtieth a year up to a maximum of forty sixtieths. Sixty years of age are required, but provision is made for dispensing with this condition in case the applicant brings evidence to the authorities, which shall consist of a medical certificate, that he is permanently incapacitated for the performance of his duties. The pension claim may be enforced by mandamus.<sup>2</sup> A later statute<sup>3</sup> provides that the pension may be capitalized.

<sup>1</sup> See Prussian Laws, March 27, 1872 ; March 31, 1882 ; Imperial Law, March 31, 1873 ; Stengel *Wörterbuch*, *sub verb. Beamte, Pension*.

<sup>2</sup> Todd, *op. cit.*, I., 654, note and authorities cited.

<sup>3</sup> 34 and 35 Vict., c. 36.

## CHAPTER V.

### THE DUTIES OF OFFICERS.

In the following treatment of the duties of officers it is not intended to discuss the various matters of official routine which are in the sphere of competence of all officers, but to refer to those general obligations which every one assumes who enters into the official relation. Before attempting to make any classification of these general obligations, it will be well to allude to a general principle of the law which is of great importance. This is that a statute which apparently confers merely a power upon an officer may be construed as imposing a duty upon him. For in many cases it is one of the duties of an officer to exercise his powers. Thus a statute which says that an officer may do a certain thing is often construed as meaning that the officer shall do the thing. The rule as to when such a statute will be construed as imposing a duty has been well laid down in the case of *Mayor v. Furze*,<sup>1</sup> in which it was held that a statute, conferring a power upon a municipal corporation to make and repair sewers, imposed upon such corporation the duty of repairing the sewers. Judge Nelson laid down the rule as follows: "Where a public body or officer has been clothed by statute with power to do an act which concerns the public interest or the rights of third persons, the exe-

<sup>1</sup> 3 Hill, N. Y., 612.

cution of the power may be insisted on as a duty, though the phraseology of the statute be permissive merely and not peremptory.”<sup>1</sup> Finally, while in general a discretionary power may be exercised in such a manner as the officer having the discretion shall see fit, still it is generally the duty of such officer to make some exercise of his discretion.<sup>2</sup>

The general obligations which are imposed upon officers are of two kinds. In the first place the law states positively certain things which all officers must or must not do, and provides penalties of a criminal character for disobedience of its provisions. In the second place the very existence of the official relation makes it necessary that an officer shall or shall not do certain things or shall behave towards the public in a certain way. The first class of duties are largely negative in character and the rules of law which contain them form a sort of special criminal law for officers, in that the law imposes criminal punishment upon their violation. The second class of duties are more positive in character and form a sort of official code of ethics, which can be maintained in those countries where an official *esprit du corps* has not been developed, only by the existence of a strong disciplinary power. Where great reliance has been placed upon the *esprit du corps*, or where the disciplinary power is large, it will not be necessary to form a very large official criminal code. Where, however, this official *esprit du corps* is not to be found or where the disciplinary power is slight we find a large official criminal code.

<sup>1</sup> Cf. Mechem, *op. cit.*, sec. 593.

<sup>2</sup> Board of Police v. Grant, 17 Miss., 77; Hightower v. Oberbanker, 65 Iowa, 347; People v. Auditors, 82 N. Y., 80.

*I.—Duties with a penal sanction.*

1. *Common law crimes of officers.*—In the first place it may be laid down that officers even more than ordinary persons are bound to obey the law. The criminal law of almost every country regards as a crime almost every act of an officer which, if committed by an individual, would be a crime.<sup>1</sup> But further the criminal law of England and the United States declares any act or omission in disobedience of official duty by one who has accepted office, “when it is of public concern, to be a crime.”<sup>2</sup> The endeavor is, however, made to distinguish between discretionary and ministerial officers. The general rule is particularly applicable, says Mr. Bishop, “where the thing required to be done is of a ministerial or other like nature, and there is reposed in the officer no discretion.” In the case of officers acting with discretion the act to be punished criminally must be wilful and corrupt.<sup>3</sup> But it is to be noted that the law excepts the highest officers of state from this criminal common law liability for mis-feasance or non-feasance in office.<sup>4</sup> In these cases the control of the legislature<sup>5</sup> is regarded as sufficient. In some of the commonwealths this common-law liability is increased by statute so as to make the mere wilful violation of official duty without corrupt motives punishable criminally.<sup>6</sup>

<sup>1</sup> See Bishop, *Criminal Law*, II., sec. 982; Block, *Dictionnaire, etc.*, 981; Loening, *Deutsches Verwaltungsrecht*, 126.

<sup>2</sup> Bishop, *op. cit.*, sec. 459; Gneist, *Das Englische Verwaltungsrecht*, 381.

<sup>3</sup> *People v. Coon*, 15 Wendell, N. Y., 277; *People v. Norton*, 7 Barbour, N. Y., 477; Gneist, *op. cit.*, 381.

<sup>4</sup> Bishop, *op. cit.*, I., sec. 462; Gneist, *op. cit.*, 383.

<sup>5</sup> For which see *infra*, II., p. 296.

<sup>6</sup> So in New York. See *People v. Brooks*, 1 Denio, 457, construing a provision of the revised statutes.

2. *Statutory official crimes.*—Further in both England and the United States certain specific acts by certain specific officers or by officers generally are by statute expressly made punishable criminally. Thus the new civil-service laws of the United States have provided that it shall be a crime for any officer to solicit or receive assessments for the payment of party expenses from any one in the service.<sup>1</sup> It would be of course impossible to enumerate these criminal provisions imposing punishments upon officers for the doing of illegal acts. All that need be said about the system in the United States and England is that this method of enforcing the performance by officers of their duties has been carried further than in almost any other country, and simply for the reason that the general disciplinary powers of the higher administrative officers are rather weaker in the United States and England than elsewhere.<sup>2</sup>

In neither France nor Germany are the duties of officers enforced so commonly in this way. In the first place there is no common-law liability for mere mis-feasance or non-feasance in office.<sup>3</sup> It is to be noted also that while in France the highest officers of state are as in the United States not criminally liable before the ordinary courts, in Germany no such exception is made.<sup>4</sup> The method in both France and Germany is to enumerate certain acts which, when done by officers, shall be punished criminally. In many

<sup>1</sup> U. S. L., secs. 11-14; N. Y. L., secs. 11-14.

<sup>2</sup> M. Laferrière in his work on *La Juridiction Administrative* has called attention to this peculiarity of the American law. See I., 101.

<sup>3</sup> See Gneist, *Das Englische Verwaltungsrecht*, 381, note; Loening, *Deutsches Verwaltungsrecht*, 127.

<sup>4</sup> Laferrière, *op. cit.*, I., 660 *et seq.*; Bornhak, *Preussisches Verwaltungsrecht*, I., 144, sec. 24.

cases the same acts which are prohibited or commanded by the law of the United States are prohibited or commanded under similar criminal penalties by the law of both France and Germany. Thus it seems to be the general rule everywhere that, where the official oath is prescribed, as it so generally is, it is the duty, sanctioned by a criminal penalty, of the officer to take such oath before he enters upon the performance of the duties of the office. The taking of it is not, however, generally regarded as a qualification for the office, but a duty whose violation is to be punished criminally.<sup>1</sup> The same is true of the filing of the official bond or the deposit of security, where that is required. It is to be noticed that the rules on the continent are generally much more strict in this respect, particularly where the officer is in charge of public funds.<sup>2</sup> On the continent the deposit of some valuable security, either money on which the government will pay the officer interest, or the deposit of state stocks, is often required. When this is required, the government has the rights of a pledgee over the deposit, which is regarded as in the nature of collateral security.<sup>3</sup> In some cases the fulfilling of these formalities is expressly made something more than a mere duty, and becomes a necessary qualification in order to the filling of the office. In such cases all acts of the officer, performed before the oath is taken or the bond filed or security given, are void and of no effect. But this is rare.<sup>4</sup> In the second place it is very commonly

<sup>1</sup> See Mechem, *op. cit.*, secs. 255 *et seq.*; Schulze, *Deutsches Staatsrecht*, I., 323; Block, *Dictionnaire, etc.*, 976 *et seq.*

<sup>2</sup> See Mechem, *op. cit.*, secs. 263 *et seq.*; Schulze, *loc. cit.*; Block, *loc. cit.*

<sup>3</sup> Schulze, *loc. cit.*; Block, *loc. cit.*

<sup>4</sup> Cf. Block, 20, 42, 357, 977.



provided that the attempt of an officer to extort from persons doing business with his office larger fees than are provided by law shall be regarded as a crime, *viz.*, the crime of extortion.<sup>1</sup> Finally it is very generally provided that the revealing of state secrets is a crime, and where this is not expressly provided such action might be regarded in some cases as treason.<sup>2</sup> In many countries officers may not be forced in court to testify to anything which is regarded as affecting disadvantageously the service of the country.<sup>3</sup>

## II.—Duties of a moral character.

The second class of duties to which allusion has been made are more moral than legal in character, are largely based on executive usage, and owe their force almost entirely to the existence in the executive of a disciplinary power. Although they may in some cases be sanctioned by criminal penalties, as in the class of duties just considered, still they will never be well performed unless through the long-continued exercise of a strong disciplinary power there has grown up in the civil service an *esprit du corps* similar to that which is found in the military service and which forbids an officer to be guilty of conduct which is unbecoming an officer and a gentleman. These duties, so far as they may be classified at all, may be classified under the following heads:

1. *Obedience to orders.*—The general duty of obedience to the orders of superior officers is to be

<sup>1</sup> See for the United States, U. S. Stats. at Large, IV., 118; N. Y. Penal Code, sec. 557; for France, Penal Code, art. 160.

<sup>2</sup> French Penal Code, art. 80.

<sup>3</sup> See German Code of Civil Procedure, sec. 341; German Code of Criminal Procedure, sec. 53; Block, *op. cit.*, 981; *cf.* Greenleaf on *Evidence* 14th Ed., secs. 250, 251; Marbury v. Madison, 1 Cranch, 137.

found in all hierarchically organized administrative systems, and can in the nature of things exist only in such systems. But the different countries differ much in the responsibility which officers assume in obeying orders. In the United States, England, and in the Imperial service of Germany no officer, even where the service has been hierarchically organized, is relieved from responsibility over against third persons for violating the law or the constitution, because he has obeyed the orders of his superior<sup>1</sup>; and in case he disobeys orders he may be subjected to the exercise of the disciplinary power of his superior where no limit has been placed upon such power. On the continent, however, in some cases an officer who has obeyed orders is relieved from all responsibility which is to be assumed by the officer giving the orders.<sup>2</sup>

2. *Prompt performance of the duties connected with the office.*—This general duty differs considerably in its content in different states. But in all it means the uninterrupted performance of the duties of the office, except where leave of absence has been granted by the superior as in case of legal vacations and sickness. In some states it means also residence at the place where the office is situated.<sup>3</sup> In the United States, however, this would not seem to be universally or even commonly the rule. In some states also it means the devotion of the entire time of the officer to the duties of the office, *i. e.*, the officer is forbidden to engage in any other occupation.<sup>4</sup> In the United States and England this does not seem to be generally the rule. Of course there are a great number of offi-

<sup>1</sup> *Infra*, II., p. 166.

<sup>2</sup> Stengel, *Wörterbuch*, I., 140.

<sup>3</sup> Loening, *op. cit.*, 123.

<sup>4</sup> *Ibid.*

cers even in these countries where, in the nature of things, the duties of the office will be so absorbing that the officer will have no time to devote to any other occupation. But when this is the case, it is a practical outcome of the position rather than a legal rule. Seldom is it the rule in these countries that an officer has not the right to engage in other occupations if he can in the nature of things do so. Many of the higher officers in the United States who receive large salaries and have very responsible duties to perform are, at the same time that they are holding office, engaged in some other occupation, such, *e. g.*, as the practice of the legal profession. They in these cases simply superintend the performance of the work of their offices, leaving most of the routine work to be attended to by deputies. Our system makes it necessary to permit the higher officers, at any rate, to engage in other occupations because, on account of the legal precariousness of the official tenure and of the actually frequent changes made in the offices, it is almost impossible to demand of any man that he shall give up his entire time to his official work. Our system, when not carried too far, has also its advantages since by its means we obtain a real self-government system of administration. On the continent of Europe the rule is quite different. Office-holding is there regarded very much more as a profession to which the officer must devote his entire time.<sup>1</sup>

3. *Good conduct.*—The duty of good conduct, *i. e.*, courteous behavior to the public and generally orderly conduct, is a duty almost altogether of a moral character and is hardly susceptible of legal definition.

<sup>1</sup> *Supra*, II.; Block, *op. cit.*, 976.

Further it is dependent for its enforcement almost entirely upon the existence and the exercise of a disciplinary power. Some states, however, recognize it explicitly in their law. Thus the civil-service law of the United States national government provides that no person shall be retained in the service who habitually indulges to excess in intoxicating liquors, and most of the official codes in Germany require from officers orderly conduct—conduct such as will command the respect of the citizens.<sup>1</sup> This provision, although it is formulated somewhat vaguely in the law as it must necessarily be, really means something, on account of the strong *esprit du corps* among the officers of the German civil service. It is, we may say, somewhat equivalent to the duty of an officer in the military service to conduct himself in a manner becoming an officer and a gentleman. This duty of orderly conduct has of late years come in the United States and England to mean that an officer must not be guilty of offensive partisanship against the ruling party in the executive office or of taking an active part in political contests.<sup>2</sup> A good example of what the duty of courteous behavior to the public means and how it may be enforced may be found in an incident which occurred at Washington not many years ago. An individual who had business with one of the departments was treated with incivility by one of the clerks. Complaint was made to the superior officer and the clerk was dismissed from the service by the secretary with the remark that every man “who had business with the treasury was entitled to civil treatment, and that no employee who was un-

<sup>1</sup> Schulze, *op. cit.*, I., 323.

<sup>2</sup> See *Pol. Sci. Qu.*, III., 252; Todd, *op. cit.*, I., 631.

able to remember that he was a servant of the people and bound to be courteous to those whom he served need expect to be retained.”<sup>1</sup>

*III.—Responsibility of officers for violation of duty.*

The violation of the duties which have been so briefly outlined may result in a three-fold responsibility. In the first place if an individual is damaged by the violation of his duty by an official, the official may in some cases be held liable to reimburse the injured individual to the extent of the damage which he has suffered.<sup>2</sup> In the second place, if the law has attached a criminal penalty to the violation of official duty the officer may be punished criminally.<sup>3</sup> Finally if the administration is at all centralized and if the disciplinary power is strong, as it generally is in all centralized systems of administration, the violation of official duty will lead to an administrative responsibility. In some cases, as, *e. g.*, in the United States, the disciplinary power, where it exists, consists for the most part of the power of removal. Where this is unconditional it would seem that the power to inflict lighter disciplinary penalties than removal would practically be derived from it as the offending officer would prefer to submit, for example, to the imposition of a fine rather than lose his place altogether. A disciplinary power may, however, exist where there is no absolute power of removal or where the power of removal is conditioned upon the finding of some cause when the decision of the disciplinary power as to what is cause

<sup>1</sup> See *New York Times*, Nov. 24, 1885.

<sup>2</sup> See for a further development of this subject *infra*, II., p. 163.

<sup>3</sup> See *infra*, II., p. 179.

is generally reviewable by the courts.<sup>1</sup> For the power may be given to a disciplinary authority to impose fines, to decree the loss of promotion, where that is provided as a claim in the nature of a right, to degrade the officer by placing him in a lower rank than that which he occupies at the time he violates his duty, to suspend him from the service and even in extreme cases to order his arrest. This sort of disciplinary power is more extended in Germany than elsewhere because of the fact that the power of removal is not generally an absolute one.<sup>2</sup> Although such a disciplinary power does not as a rule exist in the American administrative system, still we do find instances of it in the case of the purely professional services which have been established in some of the cities, as, *e. g.*, the fire and police forces. Thus section 272 of the present New York charter<sup>3</sup> provides that the board of police "shall have power, in its discretion, on conviction of a member of the police force of any legal offence or neglect of duty, or violation of the rules, or neglect or disobedience of orders, or absence without leave, or any conduct injurious to the public peace or welfare, or immoral conduct, or conduct unbecoming an officer, or other breach of discipline, to punish the offending party by reprimand, forfeiting and withholding pay for a specified time," not exceeding thirty days, or dismissal from the force.

<sup>1</sup> See *People v. Board of Police*, 72 N. Y., 415; *State v. St. Louis*, 90 Mo., 19; *Stockwell v. Township Board*, 22 Mich., 341; see also *Kennard v. Louisiana*, 92 U. S., 480.

<sup>2</sup> See Stengel, *Wörterbuch*, etc I., 270, *sub verbo Disciplin*; see also for France where the power of removal is almost practically unlimited, Block, *op. cit.*, 980 *et seq.*

<sup>3</sup> N. Y. L. 1882, c. 410.

Each of these three kinds of responsibility, *i. e.*, the civil, criminal, and administrative, reinforces and supplements the others. Therefore, as might be expected, the extent of each kind of responsibility is not the same in different states. Where the disciplinary power is small, the criminal responsibility is very large, as is the case in the United States. Where the civil responsibility is small, as is also the case in the United States compared with some of the other countries, again we find a large criminal responsibility. Finally if the administrative responsibility is extensive it may be unnecessary to develop the other kinds of responsibility to any great extent. No hasty judgment should be drawn regarding the responsibility of officers in any one country from a consideration of only one of these various kinds of responsibility as all reinforce and supplement each other.

## CHAPTER VI.

### TERMINATION OF THE OFFICIAL RELATION.

The official relation is terminated in various ways. The first to be mentioned is by death. This is so simple that it hardly needs any discussion. All that need be said in regard to it is that an office held by several is not terminated or made vacant by the death of one of the incumbents<sup>1</sup>; that in some cases the widow or the family of the deceased officer has a claim to a pension, and that the estate of the deceased officer may be made responsible for claims against it held by the government. The official relation is thus not in all cases absolutely terminated by the death of the incumbent of the office. A more important way of terminating the official relation is by the expiration of the term of office.

#### *I.—Expiration of the term.*

The general rule would seem to be that the expiration of the term of the office causes the official relation to cease so far as the future is concerned. The officer has, after the expiration of his term, no duties and no authority to act, except to complete unfinished business and except in so far as the principles of law with regard to officers *de facto* may come in to modify this

<sup>1</sup> *People v. Palmer*, 52 N. Y., 84.



rule.<sup>1</sup> But in order to overcome the inconveniences of such a rule it is often provided that an officer shall hold over until his successor enters upon the performance of his duties. Where such a provision exists it is held that, so far as this is necessary to the protection of the public, the officer will be deemed to be in office even if his resignation has been accepted.<sup>2</sup>

In the United States the subject of the term of office has become very important on account of the practice of fixing a specified term of office for almost every governmental office. The constitution of the United States, and the first constitution of New York provided a fixed term for very few offices. The first change in this system of indefinite terms of offices for officers of the national government was made by the law of 1820.<sup>3</sup> This statute provided that all district-attorneys, collectors of the customs, naval officers and surveyors of the customs and certain other officers should be appointed for a term of four years, but should be removable at the pleasure of the removing power. The act was retroactive in effect. It will be noticed from an examination of the act and debates of Congress when the proposition was made several years later to repeal it, that the alleged motive in passing it was to cause the different disbursing officers of the government to feel a stronger sense of responsibility, as the formalities of a removal would not have to be gone through with in case they were not up in their accounts.<sup>4</sup> It is said,

<sup>1</sup> *People v. Tieman*, 30 Barbour, N. Y., 193; *Newman v. Beckwith*, 61 N. Y., 205; *Lawrence v. Rice*, 12 Metc., Mass., 527, 533.

<sup>2</sup> *Badger v. U. S.*, 93 U. S., 599, 603; *Jones v. Jefferson*, 66 Tex., 576.

<sup>3</sup> L., May 15, 1820.

<sup>4</sup> See speech of Mr. Webster in the Senate, Benton's *Debates*, XII., 599, 605.

however, that the real motive in passing the act was a partisan political one; and that several party leaders thought the system of arbitrary removals from office which had unfortunately been introduced into New York might be introduced into the national administrative system much more easily if such a law as that of 1820 were adopted.<sup>1</sup> But whatever was the motive of Congress in passing this act, which at the time it was passed attracted little attention, it soon became apparent that its effect was the practical removal of many officers regardless of their conduct in office who happened not to be in sympathy with the dominant political party.<sup>2</sup> The introduction of the principle of the removal of officers for political reasons was believed by some of the best American statesmen to be so disastrous that repeated attempts were made to repeal the act of 1820, one a few years after its passage in 1825 and one in 1836, when many prominent men in the Senate voted for its repeal. These attempts at repeal all failed of success; and in the meantime the people had become so accustomed to seeing officers, whose term of office was limited by the law, fail of reappointment and replaced at the expiration of their term by persons in sympathy with the party in power that this principle of "rotation in office," as it began to be called, was regarded as one of the essential features of the American administrative system.<sup>3</sup> The principle was finally extended to almost all the offices in the national government and from thence into the administrative systems of most of the commonwealths, so

<sup>1</sup> See Publications of the Civil-Service Reform Association, No. 5, p. 24; F. W. Whitridge, on "Rotation in Office" in the *Pol. Sci. Qu.*, IV., 284.

<sup>2</sup> *Ibid.*, 286.

<sup>3</sup> See Benton's *Debates*, XII., 591.

that now the term of almost every administrative office in the United States is fixed by law at a certain number of years, generally four. Further it is generally expected that a new administration will not reappoint the old incumbents.<sup>1</sup> The effect of these term of office laws, as they are called, has thus been almost altogether bad, and the alleged motive for their adoption is seen to be based on no reasonable grounds when it is remembered that the disciplinary power of the government at the time when they were adopted was, as it is now, practically absolute. The evils of the laws have been somewhat alleviated so far as the classified service is concerned by the introduction of competitive examinations, since now the appointing power may not appoint to positions in the classified service exactly the persons it may wish to. But on account of the relative smallness of the classified service the evils of fixed terms of office are still very great and the attempt is now being made to secure the repeal of the laws which introduced the principle into the American system.

### *II.—Resignation.*

The official relation may be terminated by resignation on the part of the incumbent. While all the cases agree upon this principle there seems to be a difference of opinion as to the necessity of the acceptance by the proper person of the resignation. Some of the cases, basing themselves on the old English rule that governmental offices were obligatory, and seeing that the recognition of an absolute right in the officer to resign

<sup>1</sup> As to the number of offices whose incumbents are changed by an incoming administration, see F. P. Powers on "The Reform in the Federal Service" in *Pol. Sci. Qu.*, III., 267, 276.

regardless of the wishes of his superiors would result in the destruction of the obligation of office, have held that a resignation is not effective until it has been accepted.<sup>1</sup> Other cases have added to the old English rule the corollary that resignation has at common law absolutely no effect, that unless the statute gives the power to some one to accept a resignation, acceptance of a resignation even by an authority which is the recognized superior of the officer resigning does not have the effect of terminating the official relation.<sup>2</sup> Other cases, losing sight of the fact that at common law acceptance of a long series of offices was obligatory, have laid down the general rule that acceptance of a resignation from officers is never necessary.<sup>3</sup> If, however, the general rules laid down in these cases are not considered but only the actual decisions rendered, it will be found that the contradiction is not really so great as it seems. For almost all the cases holding that acceptance of the resignation is necessary were decided with regard to local offices which were obligatory offices in the self-government system of administration, while those cases which have held the acceptance to be unnecessary have been decided with regard to offices of the general government to which the common law rule is not regarded as applying and which take up most if not all the time and attention of the incumbent—are therefore more or less profes-

<sup>1</sup> *Van Orsdell v. Hazard*, 3 Hill, N. Y., 243; *Hoke v. Henderson*, 4 Deveraux, N. C. L., 1., 25.

<sup>2</sup> See *State v. Ferguson*, 31 N. J. L., 107; but see *Van Orsdell v. Hazard*, 3 Hill, 243, which claims for the appointing power the right to accept a resignation.

<sup>3</sup> See *People v. Porter*, 6 Cal., 26; *State v. Clark*, 3 Nev., 519; *Olmsted v. Dennis*, 77 N. Y., 378; *Wright v. U. S.*, 1. McLean, 509, 512; 14 Opinions Atty. General, 259.

sional in character.<sup>1</sup> In all cases resignation consists in the intention to relinquish the office accompanied by an absolute relinquishment.<sup>2</sup> Provided these facts are present it makes no difference how the resignation is made. It may be and usually is in writing, but it also may be made by parol.<sup>3</sup> Where the acceptance of the resignation is not regarded as necessary it has been held that the resignation is complete as soon as it is out of the power of the officer resigning to recall it. Thus the resignation has been held to be complete after it has been mailed.<sup>4</sup> Where, however, acceptance of the resignation is necessary the resignation is not complete until it has been received by the authority that has the right to accept it and may be withdrawn by the officer resigning at any time with the consent of the officer who has the power to accept it.<sup>5</sup> Finally where it is provided that an officer shall hold over until his successor enters upon the duties of the office it has been held that resignation has no effect, even if it has been accepted, as the purpose of the law is to prevent an official *interregnum*.<sup>6</sup> As there is no formal way prescribed for the making of a resignation so there is no formal method prescribed for its acceptance. Thus the filing without objection of the resignation in the proper office has been held to be an acceptance,<sup>7</sup> so also the appointment of a successor.<sup>8</sup> The resignation may

<sup>1</sup> See *Edwards v. U. S.*, 103 U. S., 471.

<sup>2</sup> *Biddle v. Willard*, 10 Ind., 62, but see *Blake v. U. S.*, 14, Ct. Cl., 462, holding that the resignation of an officer while temporarily insane is valid.

<sup>3</sup> *Barbour v. U. S.*, 17 Ct. Cl., 149.

<sup>4</sup> *State v. Clarke*, 3 Nev., 519.

<sup>5</sup> *Biddle v. Willard*, 10 Ind., 62; but see *State v. Hauss*, 43 Ind., 105.

<sup>6</sup> *Badger v. U. S.*, 93 U. S., 599; *Edwards v. U. S.*, 103 U. S., 475; *Thompson v. U. S.*, 103 U. S., 480.

<sup>7</sup> *Pace v. People*, 50 Ill., 432; see also *Gates v. Delaware Co.*, 12 Iowa, 432.

<sup>8</sup> *Edwards v. U. S.*, 103 U. S., 471.

never, however, be retrospective since that would permit an officer to escape official responsibilities.<sup>1</sup>

In France and Germany, while the general right to resign from all offices not obligatory in character is recognized as in England and the United States, still certain limitations on the exercise of the right are to be found in the laws. Thus in France the penal code<sup>2</sup> punishes all officers who by a preconcerted decision resign in order to prevent or suspend the action of some public service; while in Germany the officer about to resign must give three months' notice of his intention, and the resignation is not effectual until he has finished his work and, in case he has public property in his charge, until his accounts have been fully settled; and the resignation must be accepted.<sup>3</sup>

### III.—Loss of qualifications.

Loss of qualifications generally entails loss of the office. Thus the attainment of an age which by law unfits for the office will terminate the official relation except in so far as the doctrine of officers *de facto* comes in to modify the rule. Also conviction for crime, which results in the loss of the qualification of good character, will terminate the official relation.<sup>4</sup> One of the most common methods of losing the necessary qualifications is the acceptance of an incompatible office. This is regarded as, *ipso facto*, a vacation of the first office even if the second office is inferior to the first<sup>5</sup>; and even though the title to the second office is

<sup>1</sup> I. First Comptroller's Decisions, 325.

<sup>2</sup> Article 126.

<sup>3</sup> Schulze, *op. cit.*, I., 341; for France see Block, *Dictionnaire, etc.*, 986.

<sup>4</sup> *E. g.*, see N. Y. L. 1892, c. 681, sec. 20.

<sup>5</sup> *Milward v. Thatcher*, 2 T. R., 81; I. First Comptroller's Decisions, 324 and cases cited; *Mechem, op. cit.*, sec. 420 and cases cited.

defective the first office may not be claimed if in the meantime it has been filled.<sup>1</sup> The only exception to this rule is that where the incumbent of the first office has not the right to resign or where his resignation is not complete, as, *e. g.*, it has not been accepted when acceptance is necessary. Here the acceptance of the second office has no effect.<sup>2</sup> The incompatibility which is necessary in order to vacate the office may result from common law or from statute. The common law holds that an "inconsistency in functions of the two offices and not the mere lack of time or inability properly to perform the duties of the two offices is an incompatibility."<sup>3</sup> Sometimes the statutes merely declare that two offices are incompatible when the rule as stated would apply; sometimes they declare that no person shall hold at the same time two lucrative offices. Where the two offices are found in the same government, as, *e. g.*, in the commonwealth, or where the second office is held in another government over which the government laying down the rule has no jurisdiction, then the rule is that the second office is to be deemed an incompatible office, and that therefore the first office is vacated.<sup>4</sup>

But these incompatible offices must be clearly distinguished from forbidden offices. Here the rule is not that the first office is vacated but that it is absolutely impossible for a person to accept an office for which he is made ineligible by the fact of his holding

<sup>1</sup> *Rex v. Hughes*, 5 B. and C., 886.

<sup>2</sup> *Rex v. Patterson*, 4 B. and Ad., 9.

<sup>3</sup> See *People v. Green*, 58 N. Y., 295; *Mechem, op. cit.*, sec. 423 and cases cited.

<sup>4</sup> See *Darley v. State*, 8 Blackford, Ind., 329; *Dickson v. People*, 17 Ill., 191; *State v. Buttz*, 9 S. C., 156; *Lucas v. Shepherd*, 16 Ind., 368; *State v. Newhouse*, 29 La. Ann., 824.

another office.<sup>1</sup> When the law provides that no person shall hold two lucrative offices and a person holding an office over which the government laying down the prohibition has no control (as, *e. g.*, a United States post office), accepts an office over which such government has control (as, *e. g.*, a commonwealth office), then the second office is regarded as a forbidden office. The first one is therefore not vacated as in the case of an incompatible office, but the individual is deemed ineligible to the second office.<sup>2</sup>

Finally persistent refusal to perform the duties of the office is regarded as an abandonment of the office.<sup>3</sup> All cases of resignation, disqualification, or abandonment of office are decided finally by the courts.<sup>4</sup>

#### IV.—Removal from office.

The power may be given to an administrative officer to remove other officers whatever be the method of forming the official relation. Thus a power may be given to the chief executive to remove officers who obtained their offices by popular election. Take, *e. g.*, the case of the New York sheriff and the French mayor. Both are elected directly or indirectly by the people and yet both as a result of statute may be removed by the chief executive. Where, however, the tenure of an office is by election, or where the term of an officer is fixed by law for a certain period, it would seem to be the law in the United States that in order that the power of removal may be possessed by any

<sup>1</sup> *People v. Clute*, 50 N. Y., 451; see also *Searcy v. Grow*, 15 Cal., 117.

<sup>2</sup> *State v. De Gress*, 53 Tex., 387; *People v. Leonard*, 73 Cal., 230.

<sup>3</sup> *Mechem, op. cit.*, sec. 435 and cases cited.

<sup>4</sup> *Van Orsdell v. Hazard*, 3 Hill, N. Y., 243; *Mechem, op. cit.*, secs. 435 *et seq.*, 478 and cases cited.



other administrative officer, it must have been granted by some statute. If, however, an officer is appointed by a superior officer it would seem to be the rule, in the absence of any statute fixing the term or tenure, that the power of removal is incident to the power of appointment.<sup>1</sup> It is quite common in the United States for the legislature to confer upon the chief executive officer the power of removing officers whom he has not the power to appoint.<sup>2</sup> The power conferred in such cases may be absolute or it may be conditional. The power of removal when incident to the power of appointment is usually absolute. It is therefore absolute in the United States national government; in the commonwealths it is also usually absolute for the subordinates in the departmental services, and also for the clerical services in the localities. It is also usually absolute in both England and France, both in the central and the local services. Where conditions are imposed, they consist sometimes in the necessity of obtaining the consent of an executive council. This is frequently true of the power of the governor to remove the important "state officers."<sup>3</sup> In other cases, which are very frequent in the United States commonwealths, the condition consists in the fact that the removal may be for cause only. Where the cause is not particularly specified, the removing officer is generally to decide what is cause sufficient to justify his action,<sup>4</sup> subject, however, to the review of the courts.<sup>5</sup> These have held that the cause sufficient to justify a removal for cause, must be some dereliction of duty or in-

<sup>1</sup> *Ex parte Hennen*, 12 Peters, U. S., 230, 239; *People ex rel. Sims v. Fire Commissioners*, 73 N. Y., 437; *Mechem, op. cit.*, sec. 445.    <sup>2</sup> *Ibid.*, sec. 447.

<sup>3</sup> *Supra*, I., pp. 103, 104.

<sup>4</sup> See *Dubuc v. Voss*, 19 La. Ann., 210.

<sup>5</sup> *Matter of Nichols*, 6 Abbott's New Cases, N. Y., 494.

capacity or delinquency and that the mere fact that another person might perform the duties of the office better than the incumbent is not sufficient cause.<sup>1</sup> Sometimes the statutes granting the power of removal or fixing the tenure of an officer specify distinctly the causes for removal. If such is the case the removing officer may remove only for the causes specified in the law.<sup>2</sup> Ordinarily the causes which are thus specified are official misconduct, mal-administration in office, breach of good behavior, wilful neglect of duty, extortion, and habitual drunkenness. The legislature may in the absence of constitutional provision determine what shall be sufficient to justify the exercise of the power of removal; but where the constitution provides that certain causes will justify the exercise of the power, the legislature may not add new causes.<sup>3</sup> Where the law provides for removal for official misconduct it is necessary to separate the character of the officer from the character of the man who holds the office. That is, misconduct must be official in character.<sup>4</sup> In all cases where the power of removal is conditioned upon the existence of cause it is necessary for the removing officer to give the officer to be removed an opportunity to be heard in his defence.<sup>5</sup> But where the removing officer has the arbitrary power of removal this is not necessary, though it may be made so by statute.<sup>6</sup> As a general thing the power of removal

<sup>1</sup> *People v. Fire Commissioners*, 73 N. Y., 437.

<sup>2</sup> *Mechem, op. cit.*, sec. 450 with cases cited.

<sup>3</sup> *Mechem, op. cit.*, sec. 457; *Commonwealth v. Williams*, 79 K'y., 42.

<sup>4</sup> *Ibid.*; *Commonwealth v. Hardin Barry*, K'y., 160.

<sup>5</sup> *Dullam v. Willson*, 53 Mich., 392; see *Foster v. Kansas*, 112 U. S., 201; *Kennard v. Louisiana*, 92 U. S., 480; *Mechem, op. cit.*, sec. 454, and cases cited.

<sup>6</sup> *Ex parte Hennen*, 13 Peters, 230; N. Y. Const., V., sec. 4.

does not include the power to suspend,<sup>1</sup> though it may be expressly so provided by statute.<sup>2</sup> The removal may be express or implied. Where the power is absolute the appointment of another person to an office with the intention of superseding the incumbent is regarded as a removal.<sup>3</sup> But it is said that the removal to be effectual must be brought to the notice of the officer removed.<sup>4</sup>

In one country, *viz.*, Germany, the rule seems to be that no officer possesses the arbitrary power of removal. Nearly all the officers are appointed for life or for fixed terms, and can be removed only as the result of a conviction of crime or of the decision of a disciplinary tribunal. The proceedings before such disciplinary tribunals have many of the characteristics of a criminal trial.<sup>5</sup>

#### V.—*Legislative action.*

It has already been pointed out that an office is not a contract. It is therefore perfectly within the power of the legislature, in the absence of some special constitutional limitation, to terminate the official relation either by abolishing the office, shortening the term, declaring the office to be vacant, or by transferring the duties of one office to another, or to increase its duties.<sup>6</sup>

<sup>1</sup> Gregory v. New York, 113 N. Y., 416.

<sup>2</sup> See New York Const., V., secs. 3 and 7; N. Y. L. 1875, c. 39.

<sup>3</sup> People v. Carrique, 2 Hill, N. Y., 93; Bowerback v. Morris, Wallace's Reports, C. C., 119; Stadler v. Detroit, 13 Mich., 346.

<sup>4</sup> Commonwealth v. Slifer, 25 Pa. St., 23.

<sup>5</sup> See Schulze, *op. cit.*, I., 342; Stengel, *Wörterbuch, etc., sub verbo, Beamte.*

<sup>6</sup> State v. Douglas, 26 Wis., 428; Butler v. Pa., 10 How, U. S., 402; Atty.-Gen. v. Squires, 14 Cal., 13; Bunting v. Gales, 77 N. C., 283; *cf.* Mechem, *op. cit.*, sec. 465.

The same is true with regard to municipal offices. The municipal authority having the power to create offices has the right to abolish them.<sup>1</sup> Finally the legislature often has the right to terminate the official relation by means of impeachment.<sup>2</sup>

<sup>1</sup> *Augusta v. Sweeny*, 44 Ga., 463; *Ford v. Coms.*, 22 Pac. Rep., 278.

<sup>2</sup> See *infra*, II., p. 296.

# BOOK V.

## METHODS AND FORMS OF ADMINISTRATIVE ACTION.

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### CHAPTER I.

#### DISTINCTION OF THE METHODS FROM THE DIRECTIONS OF ADMINISTRATIVE ACTION.

THE administration has up to this point been considered at rest. Its organization both at the centre and in the localities, the relations of the officers and authorities with each other, and the rules in regard to the official service have been treated, it is hoped, with sufficient fulness to give an adequate idea of the administrative machinery and the character of the official system. It now becomes necessary to consider the methods and forms of the action for the purpose of which the administrative system is formed.

Great care must be taken to distinguish the methods and forms of administrative action from its directions, that is, the various services which the administration may attend to in the interest of the community. While these latter vary greatly in different states, while in some the directions of administrative action may be

much more numerous than in others, the forms and methods of administrative action must be everywhere essentially the same. Thus the administration may or may not attend to the telegraphic or railway services of the country. Whether it does or does not, it must in all cases make some contracts, if the government is to be conducted at all. Again the administration may or may not exercise a supervision over the press. Whether it does or does not, it must in all cases exercise a certain amount of police power.

The forms and methods of administrative action, being everywhere essentially the same, may be classified essentially in the same categories. We may go a step further. We may, on account of the uniformity in the civilization which lies at the basis of all state forms existing in or derived from western Europe, classify also the directions of administrative action in essentially the same categories. Thus everywhere we find the administration acting as the man of business of society, carrying on commercial undertakings too vast to be well managed by individual or corporate effort, or of such a nature as to produce better results to the community under governmental than under private management. In some states this kind of administrative action is much more important and extensive than in others, but everywhere we find the action of the administration, to an extent at any rate, commercial in character. Again we find the administration acting everywhere as the delegate of the sovereign and exercising powers of compulsion over those persons who are in obedience to the state; here also we find in some states this governmental activity, as we may call it, much greater than in others, owing to the difference in

the ends of government sought after in different states. Finally everywhere we find the administration acting directly in furtherance of the welfare of individuals, but neither by means of carrying on commercial undertakings nor by means of the exercise of governmental powers; we find it, for example, collecting information, filing and authenticating documents and records, and issuing patents and charters of incorporation. But here also we find great difference in the extent of this sort of work done in different states. We may say therefore that the directions of administrative action are commercial, governmental, or directly in furtherance of the public welfare. Any detailed treatment of these directions of administrative action would result in the attempt to treat systematically of the entire field of administrative action—of the five great administrative branches which have already been distinguished, *viz.*, foreign, military, judicial, financial, and internal affairs. Such a treatment will not be undertaken here, as it is not within the scope of the present work, which must, on account of the lack of space, be confined to the presentation of the main principles of the most important administrative systems of the present time. Neither is it necessary, in order to a correct understanding of the general principles of the administrative law, to treat of these matters any further than to state the categories in which they may be placed, since the relations of the individual with the administration resulting from the action of the administration will, on account of the general conformity of the purposes of modern states, be essentially the same. But while these great fields of administrative activity and the directions of administrative ac-

tion may properly be left for a work more special in its nature than the present one, while a general idea of the work of the administration is obtained when it is seen that its activity is governmental, commercial, or directly in furtherance of the public welfare; a somewhat detailed consideration of the forms and methods of administrative action must be undertaken here. For without it the whole system of remedies by which individuals are protected against a violation by the administration of the rights guaranteed to them by the constitution or statutes of the country cannot be understood. Since it is on the efficiency and adequacy of these remedies that the real value of all private rights depends, the importance of a clear understanding of the methods of administrative action can hardly be overestimated.



## CHAPTER II.

### THE EXPRESSION OF THE WILL OF THE STATE.

The methods and forms of the action of the administration are largely dependent upon the character of the duties which the administration is called upon to perform. The character of these duties is in turn dependent upon the nature of the rules of administrative law which the administration has to apply. These rules of law are of two kinds. They either contain a complete expression of the will of the state, or so incompletely express the will of the state that some further action is necessary in order that this will may be capable of execution.

#### *I.—Unconditional statutes.*

Those rules of administrative law which completely express the will of the state are found in statutes, which are put into the form of unconditional commands to the people to do or to refrain from doing some particular thing and which threaten the violation of their provisions with the imposition of a penalty in the nature of a fine or of imprisonment.<sup>1</sup> But in no ordinary classification of the law would they be called criminal laws, nor would they generally be inserted in the penal code. Attention has already been directed<sup>2</sup>

<sup>1</sup> Cf. Gneist, *Das Englische Verwaltungsrecht*, 1884, 320 et seq.; Loening, *op. cit.*, 225 et seq.

<sup>2</sup> *Supra*, I., p. 16.

to the fact that criminal law does not form a special portion of the law distinct from the other portions of the law as is the administrative or the private law, but that it is a law of sanction applied to well-defined branches of the law in order to ensure the enforcement of their provisions. But while those penal provisions which are intended to protect from invasion the rights of the person and property are generally classed together in the penal code, the penal laws which are intended to ensure the enforcement of the administrative law are to be found scattered through the statute book, generally in connection with that portion of the administrative law which they are intended to protect. These statements may perhaps be made clearer by one or two examples. Take the customs administrative law. As far as possible the provisions of this law are put into the form of penal provisions. The customs administrative law says to the importer and the shipmaster that they must transact their business in a certain way, that they must do given things, as *e. g.* enter their ship and their invoices of merchandise in a certain way, also that they must refrain from doing certain things, as *e. g.* that they must not unload their ships at certain times of the day, and then it threatens them with punishment if they do not obey its provisions. The mere fact that such provisions of administrative law have penalties attached to their violation does not make them any the less administrative in character.<sup>1</sup> The legislature has by this means endeavored to ensure that the business of importing merchandise shall be transacted in a certain way, since, if it is transacted in this way, the duties imposed

<sup>1</sup> See *Taylor et al v. U. S.*, 3 How., 197, 210.

upon imported merchandise will be easily collected. Again in a great many cases, which form together what is known as police law, the legislature has adopted a similar method to protect the inhabitants of the state from the happening of accidents. Thus in the larger cities the law often says that individuals must build their houses in a certain way in order to avoid the dangers of fire and ill-health resulting from careless construction and unsanitary arrangements. In order to force the individual to build his house in the way required there is a penalty attached to the violation of the provisions of such police laws. But again we would hardly insert such laws in the penal code or class them as a part of the criminal law, though it is often the case that such police laws are sanctioned by the penal code, *i. e.* violations of them are misdemeanors.<sup>1</sup> Another example of such rules of administrative law completely expressing the will of the state is to be found in those rules of administrative law with regard to the assessment and collection of a long series of indirect taxes. The law, as in the case of the customs administrative law, lays down the way in which all payers of indirect taxes shall transact their business and punishes the violation of its provisions with a penalty. For if the business of the payer of indirect taxes is transacted in the way provided by the law, the assessment and collection of the taxes are easy matters. Indeed it may be said that the tax assesses and collects itself where the method of payment by means of the purchase from the government of stamps, and the affixing of them to taxable articles is adopted. These are only a few examples of this method of for-

<sup>1</sup> *Cf.* Wharton, Criminal Law, 9th Ed., I., 23 and 28.

mulating the rules of administrative law. Every country strives so far as it can to put its administrative law into the form of absolute unconditional commands, since no rule of law is so easy of enforcement as a direct command whose violation is punishable. There is little chance of conflict between the administration and the individual to whom the law is to be applied, since in applying this class of the rules of administrative law the action of the administration is confined to hunting up all violations of them and to seeing that the penalties for such violations are enforced. The administration has little or no discretion to exercise, since the will of the state has been completely expressed in the law and since therefore the administration has only to execute the law.

## *II.—Conditional statutes.*

But there are certain duties which the administration is called upon to perform, which it cannot perform under a system of unconditional commands. No legislature has such insight or so extended a vision as to be able itself to regulate all the details in the administrative law or to put into the form of unconditional commands, addressed to the public at large, rules which will in all cases completely or even adequately express the will of the state. All it can do is to express that will in a general way. It enacts a series of general rules of administrative law which, in distinction from the absolute unconditional commands, may be called relative or conditional commands, since they lay down the conditions and circumstances in which it will be lawful for the administration to act; and the action of the administration in applying these conditional rules

of administrative law really consists in expressing in details, which the legislature itself is unable to foresee or which, even if it can foresee, it is unable to regulate, the will of the state, the expression of which has been made only incompletely by the legislature. While the absolute unconditional commands are addressed to the people subject to the obedience of the state, the relative conditional commands are rather addressed to the administrative authorities and are instructions to them how to act in the special cases for which provision is made. The action of the administration is not therefore confined simply to the execution of the will of the state. On the contrary the administration has a large share in the expression of the will of the state in those conditions and circumstances in which the legislature, as the regulator of the administration, has said that it may express the will of the state. The administration acts in the expression of the will of the state in two ways. It either issues ordinances or general rules which fill up details not regulated in the statutes and not possible of regulation by the legislature, or it issues special orders not of general but of individual application which apply either the statute law alone or the statute law as supplemented by administrative ordinance.

1. *Administrative ordinance*.—It has already been shown<sup>1</sup> that ordinances may be classified as independent, supplementary, and delegated; and that, while in monarchical governments the executive has the right of supplementary and in some cases of independent ordinance, in the United States the executive has simply the right of delegated ordinance. Official

<sup>1</sup> *Supra*, I., p. 28.

authority is based in all cases on the constitution or statutes.<sup>1</sup> It has also been shown that in all countries the heads of the various executive departments and the various local authorities have the right of delegated ordinance. Attention need be directed here only to the fact that while in this country the statutes of the legislature descend very much into detail, in England and especially on the continent of Europe, the legislature confines itself very much more to the enactment of general principles which it is then the duty of the executive, the heads of executive departments, or the local authorities by ordinance to carry out in their details. Thus on the continent the practice is to grant to the local authorities the local police power in the exercise of which they may enact almost any kind of ordinance whose end is to prevent the happening of harm of any kind to the people under their jurisdiction.<sup>2</sup> In this country, on the other hand, where the power of local ordinance is granted by the legislature the practice is to grant to some one authority the power to regulate the details with regard to some particular matter or matters. In some cases the administrative authority, which has the ordinance power, has also the right to sanction its ordinances,<sup>3</sup> though the tendency at the present time is for the legislature in the penal code or in some general law itself to sanction all administrative ordinances.<sup>4</sup> While on the continent the administrative authorities have much wider ordinance power than have the administrative authorities in the United States they are, in

<sup>1</sup> Cf. Mechem., *op. cit.*, secs. 501 *et seq.*

<sup>2</sup> *E. g.* ordinance power of French mayor, *supra*, I., p. 288.

<sup>3</sup> Dillon, *op. cit.*, I., 412 *et seq.*

<sup>4</sup> Cf. *e. g.*, the French penal code, art. 471, sec. 15.

order to prevent an abuse of their power, usually subjected to some sort of an administrative control in the exercise of this important power. Generally either the approval of some higher authority is required in order that the ordinances issued by a local authority be valid, or else as in Germany the ordinances must be issued with the concurrence of some one of the numerous popular lay authorities which have been created by the late local government reform.<sup>1</sup> In England also where the domain of local ordinance has of late been considerably extended, this central administrative approval is being introduced.<sup>2</sup> All ordinances in all countries must, in order that they shall have force, be brought by some legal means to the notice of those persons whom they will affect.<sup>3</sup> The means usually adopted is the same as that provided for statutes, that is, publication of some sort.

2. *Special administrative order.*—In the second place the administration aids in the expression of the will of the state by the issue of special orders of individual and not general application. It has been shown that the legislature of no state is able in all cases to declare what shall be the will of the state in such detail as to preclude the necessity of some special action on the part of the administration. Nor can administrative ordinance, and for the same reasons. Thus no general rule of any kind can declare by name what persons shall pursue those trades which require a license, or what persons or property shall pay direct taxes or the amount in money of their taxes. All that can be done

<sup>1</sup> *Supra*, I., pp. 304, 315.

<sup>2</sup> *Supra*, I., p. 260.

<sup>3</sup> How and Bemis, *Municipal Police Ordinances*, 352; *Kneib v. People*, 6 Hun, 238; *State v. Hoboken*, 38 N. J. L., 110; *Baltimore v. Johnson*, 62 Md., 225; *Higley v. Bunce*, 10 Conn., 436; *Burnett v. Newark*, 28 Ill., 62.

by general rule is to determine what requirements those persons who desire to pursue licensed trades shall fulfil and under what conditions and at what rate taxes shall be levied on persons and property. Of course in the case of license taxes, as *e. g.* the "special taxes" formerly levied by the United States national government on dealers in tobacco, it is possible to say that each taxpayer, *i. e.* each dealer in tobacco, shall pay a tax specific in amount. But what such a method may gain in simplicity, it loses in justice; and when it comes to any such system of taxation as property taxation, the injustice of requiring every property owner to pay the same amount of tax would be so glaring that no people would submit to it. In order that any system of property taxation shall be just, it must be proportional, *i. e.* the amount of tax which each taxpayer pays must be in proportion to the amount of property which he possesses. If this rule is adopted, as it is almost universally, before the amount of any given taxpayer's tax is ascertained, the amount of the property on which the tax is levied must be determined. The same general principle is true in the case of licensed trades. If any sort of control is to be kept over such trades, and the control of these trades is generally the reason of requiring them to be licensed, the qualifications of the person requesting the license must be ascertained before the license can be granted. Now the conditional rules of law which it is the duty of the administration to apply in all these cases simply state under what conditions licenses shall be granted and property taxed, and what rules shall be followed by the administrative authorities in the assessment of the property subject to taxation;



and in order that these conditional rules of law may be applied, *i. e.* in order that the will of the state in the particular conditions of some given person or piece of property may be expressed completely so that it may be executed, the fact of the existence of the conditions referred to in the law must be ascertained. Furthermore the ascertainment of the existence of these conditions is the duty of some administrative officer, whose action in aiding in the expression of the will of the state is absolutely necessary before that will can be executed. The determination reached by such an officer is an act of individual and not of general application. In this country there is no general technical name for such an act, the name varying with almost each kind of special act done. Thus such a special act is called an order, a precept, a warrant, and a decision.

There is a great variety of such special acts. Some are in the form of commands to subordinate officers or to individuals to do or to refrain from doing some particular thing, *e. g.* tax warrants, orders of payment, nuisance removal and sanitary orders; some are permissions to individuals to carry on a given business, *e. g.* licenses and authorizations; some are prohibitions to carry on a business, *e. g.* revocation of a license or authorization; some are acts which create a new legal person, *e. g.* charters of incorporation; some consist of contracts made by the administration for the government considered as a juristic person or "fiscus"; some are decisions as to the existence of certain facts whose ascertainment is necessary in order that the will of the state may be completely expressed, *e. g.* assessments, appraisements, classification of articles for duties in the

tax and customs administration; and finally some are appointments to office or orders to individuals to serve the government in some capacity, *e. g.* notice to serve as juror or in the military service.

In the performance of such acts the administration must follow a certain procedure which is laid down in the law granting it the power to act. The law thus says in the first place that certain acts shall be performed only by certain authorities. The authority before acting in any of these cases must assure itself that it is competent, for its acts will be void if it is incompetent.<sup>1</sup> In the second place the content of the act must be in accordance with the law, since every administrative order must find its basis in the statutes or supplementary ordinances of the administration.<sup>2</sup> These statutes may state specifically, as in this country, what the administrative authorities may do, or, as on the continent, they may lay down general norms simply, which the administration must follow in its discretion. In the third place the administrative act must be performed in the way provided for in the law. This is especially true if the method provided by law is intended for the protection of individual rights.<sup>3</sup> Sometimes the method of its performance is laid down in the greatest detail and any failure to follow the manner prescribed will be fatal to the validity of the act. It is so in the case of the assessment of property for the purposes of taxation<sup>4</sup>; of the destruction by the government of the property right of the individual,

<sup>1</sup> *Cf.* Mechem, *op. cit.*, secs. 500-564, for the detailed rules of the American law as to the competence of officers.

<sup>2</sup> *Cf.* Mechem, *op. cit.*, sec. 501, citing *Atty.-Gen. v. Detroit Common Council*, 58 Mich., 213, 219.

<sup>3</sup> *Cf.* Cooley, *Taxation*, 2d Ed., 280 *et seq.*

<sup>4</sup> *Ibid.*

as in the case of the exercise of the right of eminent domain<sup>1</sup> and also in the case of the contracts made by the administration for the government.<sup>2</sup> The reason is that in the one case it is considered extremely important to protect individual property rights, and that in the other the government is so liable to be cheated by its officials that some method must be adopted by means of which the responsibility for every step in the making of the contract may be fixed on some person, and that the contractual powers of governmental authorities must be limited. Further it is often the case that before a decision may be reached by the administration which has an important bearing upon private rights, opportunity must be given to all persons who are interested in the decision to raise any objections which they may desire to make to the proposed action; and, if the authority which is to take the action is a board, that sufficient time must be given for deliberation, and that the decision which is reached finally must be made by a majority vote of all the members of the board or by a majority of a quorum of the board. Where such formalities are provided it is, it may be said, absolutely necessary to the validity of the action of the administration that they be followed.<sup>3</sup> Thus the United States courts have held that the "due process of law" required by the 14th amendment to the United States constitution for the taking of private property makes the opportunity to be heard at some stage of the proceedings a necessary formality

<sup>1</sup> Dillon, *op. cit.*, II., 706; Mechem, *op. cit.*, 581.

<sup>2</sup> Dillon, *op. cit.*, I., 520, 543, and cases cited. The only possible exception to this rule is in the case of *quasi* contracts, *Ibid.*, 536.

<sup>3</sup> *Cf.* Cooley, *op. cit.*, 287; Mechem, *op. cit.*, secs. 271-281.

in property tax proceedings.<sup>1</sup> Finally the order like the ordinance must be brought by some legal means to the knowledge of the person or persons affected by it. This is particularly true of assessments for the purpose of taxation. As a general thing this is to be done in writing or by publication, but in not a few cases a mere verbal order is sufficient, as *e. g.* in the case of an order given by a constable or peace officer to a disorderly assemblage or crowd to disperse.

Thus it is that the administration discharges a most important function in expressing in detail the will of the state, so far as that will has not been expressed completely in the statutes by the legislature. In the discharge of this function of expressing the will of the state the administration must necessarily be given a wide discretion in determining the existence of the conditions which the law requires in order that the administration shall act; and in the exercise of this discretion the administration must also necessarily come into frequent conflict with individuals. This is especially true of the whole domain of what is called police administration, where the administration endeavors to protect the individual from the happening of harm through the limitation of the right of individual action. It is seen thus that the action of the administration does not consist in mere ministerial action, in execution, that it must perforce exercise great discretion in expressing the will of the state, and that in the exercise of this discretion it has an enormous influence not only upon the welfare but also upon the sphere of free action of almost every individual in the state. But while this expression of the will of the state is one of

<sup>1</sup> See *Santa Clara Co. v. R. R. Co.*, 18 Fed. Rep., 385.

the functions of the administration and has an important effect upon the character of its action, still the duty *par excellence* of the administration is not the expression but the execution of the will of the state. For whether that will has been expressed fully by the legislature or partly by it and partly by the administration it is in almost every case the administration upon which devolves the execution of that will when once completely expressed.

## CHAPTER III.

### EXECUTION OF THE WILL OF THE STATE.

#### *I.—Means of execution.*

The will of the state, whether expressed in statute, ordinance, or individual act not of general application, always contains either expressly or impliedly the command that it shall be executed. This mere command may in many cases be sufficient and in all cases would be sufficient in a perfectly well-ordered community; since individuals would, if they were perfectly patriotic and if the expressed will of the state were always just and in accordance with the law, do what they were commanded to do. But in the communities with which the administration has to deal, for some reason or other individuals will in many cases refuse to do what they are commanded to do. Some means must therefore be devised to ensure their obedience—to ensure that the will of the state be executed. The means adopted are various in kind.

1. *Imposition of penalties.*—On account of the liability of the individual to refuse to obey the command of the law, such refusal is made punishable. This is the most common means of executing the will of the state for the reason, as has been indicated, of its extreme simplicity and that it leaves little to the discre-

tion of the administration. For, as a general rule, the penalties are to be found in the law as passed by the legislature<sup>1</sup>; and such penalties are to be enforced ultimately by the ordinary courts, which are independent of the administration and act in accordance with the usual rules of criminal procedure. In this way the individual is amply protected against arbitrary action on the part of the administration. In Germany quite frequently and in some cases in the United States, however, the administration itself may proceed to impose the penalty without resort to the courts, and the individual against whom the proceedings are taken has the right to appeal to some judicial body against the action of the administration.<sup>2</sup>

2. *Enforced performance of the act ordered.*—Sometimes the execution of the will of the state will not be effected by the decree of a penalty either by the courts or by the administration itself. In many cases the will of the state can be executed only by the performance by the individual of a definite thing. This definite thing may often consist in the payment of a sum of money; or it may be absolutely necessary that the individual with whom the administration comes in conflict, actually himself do something which does not consist in the payment of a sum of money.

a. *Execution of the law by the payment of a sum of money.*—A great many of the orders of the administration, may be executed by ensuring the payment of a sum of money. Thus the orders of the administration to individuals to pay taxes and the like will naturally

<sup>1</sup> There are a few cases, especially in Germany, in which the administration has the right of sanctioning its own ordinances and orders.

<sup>2</sup> Loening, *op. cit.*, 248, note 1; See Cooley on *Taxation*, 2d Ed., 457; Parker and Worthington, *Public Health and Safety*, 103.

be executed by the payment of a sum of money and be executed also naturally only in this way. Further it may be possible that the act demanded of the individual by the administration can be performed by the administration itself, whose expenses in the doing of the act which ought to have been done by the individual at his own expense, like taxes, become an obligation of the person disobeying its order. For example if the administration orders a landlord to make repairs which are necessary from a sanitary point of view, and he refuses, it is perfectly easy for the administration to step in and do the work itself and thus found an obligation which is binding upon the individual to repay it the expenses which it has been obliged to incur in order to do the work.<sup>1</sup> Finally a similar obligation on the part of the individual may arise from the fact that a penalty has been incurred in the nature of a fine for disobedience of the law or the orders of the administration itself which, as has been shown, has the right in many cases to impose fines.<sup>2</sup> The methods adopted to ensure the payment of an obligation which has arisen in this way are usually the same as those adopted to ensure the payment of judgments of courts. That is, the amount due is either made a lien upon the real property in relation to which the obligation was formed and may be collected by its sale, or it is to be collected by the sale of the personal property of the individual from whom the obligation is due.<sup>3</sup>

b. *Arrest*.—But the will of the state cannot always be executed by the payment of a sum of money. In many cases it can be executed only by the perform-

<sup>1</sup> See N. Y. Law 1882, c. 410, secs. 630, 635.

<sup>2</sup> *Ibid.*, sec. 633.

<sup>3</sup> *Ibid.*, secs. 630, 85.



ance of a given action or the prevention of a given action. Certain things must be done or certain things must not be done in order that the will of the state may be executed. In order in these cases to compel the recalcitrant individual to act or to refrain from action he may be arrested and imprisoned. The power of arrest is found in two distinct cases in all countries. Often simple disobedience of the expressed will of the state is punished by short terms of imprisonment when the administration has the right to arrest and imprison the disobedient individual.<sup>1</sup> The other case in which resort is had to arrest and imprisonment, is where the individual refuses to do a thing which he has been commanded by the administration to do. This seems to be quite common in Germany, and is not unknown in the United States.<sup>2</sup> In such case the arrest and imprisonment are quite separate and apart from the arrest and imprisonment which the individual may have made himself liable to by his original disobedience of the law. Simple refusal to obey a competent order of the administration may be punishable by fine and imprisonment.

c. *Application of physical force.*—Finally the administration has the right to apply physical force if one of its competent orders cannot be enforced in any other way. The force may be applied to the person or to some object, and may often consist in depriving a person of some article, in shutting up some location, or in putting an end to some occupation, as *e. g.* in the

<sup>1</sup> *Ibid.*, sec. 85; *Commonwealth v. Byrne*, 20 Grattan, 165, 198, which holds that arrest decreed in accordance with law by an administrative officer in the case of non-payment of taxes is due process of law and constitutional.

<sup>2</sup> Stengel, *Wörterbuch, etc.*, II., 800, 801; Cooley, *Taxation*, 2nd Ed., 437; Burroughs, *Taxation*, 150.

shutting up of an illicit still and the destruction or seizure of the machinery found therein.

In all these cases, if resistance is offered to the administration or an administrative officer acting within his competence, the person offering such resistance may be arrested and punished, and ultimately the entire force of the government of the country may be called upon to overcome such resistance. Thus in the United States the mayor of a city may call out the militia<sup>1</sup>; the sheriff in the county may also call out the militia or the *posse comitatus*; the governor may often declare a county in a state of insurrection,<sup>2</sup> and on the application of the governor or of his own motion the President of the United States may call out the forces of the nation.<sup>3</sup> Thus every order of the administration has ultimately back of it the entire physical force of the government. But before any of the orders of the administration may be enforced, and before force may actually be applied, it is often necessary that certain formalities be complied with, which differ considerably in the different countries. This brings us to the methods of executing the will of the state after it has once been expressed completely.

## II.—Methods of execution.

In general there are two methods of executing the will of the state. Either the administration may proceed of its own motion to the execution of its orders by the use of the proper means, subject to the control of the courts, which may, on the instance of the individual affected by its action, interfere to protect his

<sup>1</sup> See e. g. N. Y. L. 1882, c. 410, sec. 269.      <sup>2</sup> *Supra*, I., p. 75.

<sup>3</sup> U. S. Rev. Stats. secs. 5297, 5298.

rights; or it is necessary for the administration to apply to the courts in the first instance to enforce its orders. The latter method is the usual one in the United States and England, although there are cases even in those countries in which the administration may proceed without having recourse to any other authority; while the former method seems to be the rule upon the continent.

1. *Judicial process*.—The reason of the adoption of the general rule in England and this country that the administration must apply to the courts to enforce its orders is largely historical. It will be remembered that at one time the justices of the peace were the most important administrative officers in the various localities both in England and in the United States. Acting singly or in pairs or in their courts of petty and special or quarter sessions the justices had a long series of really administrative duties to perform which were almost inextricably mixed up with their really judicial duties, *i. e.* with their decision of criminal cases and cases involving purely private relations.<sup>1</sup> It is true that all the acts of the justices were clothed in about the same formula<sup>2</sup>; but these may be put into three pretty distinct classes. The first class was purely judicial and took on the form of convictions or judgments made after previous hearing. The second was to be found in the orders which they issued either of their own motion or upon the proposition of an inferior officer such as a constable or overseer of the poor, where no previous hearing was given to parties who might be interested. Thus in their special sessions the

<sup>1</sup> *Supra*, I., p. 239.

<sup>2</sup> Gneist, *Das Englische Verwaltungsrecht*, 1884, 391, 392.

justices appointed parish officers and made up the jury list. In their courts of quarter sessions many of the acts performed in the exercise of their original jurisdiction, such as those relating to the financial administration of the county or the passage of by-laws, were performed of their own motion and belonged to this class of acts which were really administrative in character. In the third class may be placed those acts consisting not of decisions as to private relations or of convictions but as in the second class rather of orders in administrative matters where, however, before the order was issued a hearing was given to parties interested. Some of the acts of this class were performed by a single justice but not many; some were performed by two justices acting together, such *e. g.* as orders of removal and orders in bastardy in the poor-law administration and orders to abate nuisances in the sanitary administration; some were performed by the special sessions, as *e. g.* the decisions of differences arising between the overseers of the poor and the taxpayers in regard to tax assessments, the grant of licenses to ale-houses, the taking away of licenses, the decision of difficulties with regard to the building of roads, *etc., etc.* In all these cases the objections of interested persons were heard before the decision of the justices was made.<sup>1</sup> These acts were administrative in character but somewhat judicial in form, since they were performed only after the holding of some sort of a trial.

In the course of time a separation of the judicial and administrative functions was made in this country, the purely administrative powers going to new officers such as the supervisors, county commissioners, and the

<sup>1</sup> Cf. *Ibid.*, 266, 276-301; 381-4.

like, the purely judicial powers and most of the powers whose exercise resulted in acts judicial in form going to the justices. That is the justices retained the power of deciding on all convictions, of giving judgments in civil cases of a private legal character, and of issuing almost all the orders which might be executed without further action by any authority. The same powers possessed by the justices after this separation of judicial and administrative functions have since been conferred on other courts, such as the county and similar courts, which in this country have taken in the judicial organization the position formerly occupied by the English courts of quarter and special sessions. The result of this curious evolution of the justice of the peace from a purely or almost purely administrative officer into an almost purely judicial officer is that, since the justice or his successors have in the course of this development largely retained the power of ordering given things to be done by individuals, the administration seldom has the right to proceed to execute its orders without having first made application to a court of some sort for the power to execute the order.

Of course it is not always necessary for the administration in England and the United States to apply to the courts in order to enforce its orders. In certain cases where immediate action is absolutely necessary in order to avoid disastrous results, as in the case of the abatement of a nuisance prejudicial to the public health and in the case of the payment of taxes,<sup>1</sup> the administration may proceed directly to enforce its orders, and in case of resistance to the execution of the

<sup>1</sup> Cf. N. Y. L. 1882, c. 410, secs. 926-929; N. Y. L. 1885, c. 270, sec. 38; Parker and Worthington, *op. cit.*, ch. xii.

law may, without application to the courts, apply force to overcome such resistance; and if any individual feels aggrieved by the action of the administration he may appeal to the courts and get what satisfaction he can.<sup>1</sup>

2. *Administrative execution.*—While application to the courts to enforce the orders of the administration is generally the rule in England and the United States, and may thus be called the English method of executing the will of the state, the direct execution of its orders by the administration is the rule on the continent. The more complete separation of administration from justice on the continent, the more important rôle assigned to the administration to play there, the greater confidence the people have in its justice, or their greater indifference to the possession by the administration of large powers, has caused them to feel that it is a matter of little consequence what authority has the power of directly executing the law. What little deprivation of individual rights they may suffer by the grant of such powers to the administration they believe is compensated for by the greater efficiency of the administration resulting from its greater powers. Where this method of direct execution of its orders by the administration has been adopted, the administration often has the right to threaten persons disobeying its orders with a penalty which it itself may enforce, and which is distinct from the penalty for the original disobedience. It may directly proceed to arrest persons and seize property, shut up buildings and destroy objects, and prevent given individuals from following

<sup>1</sup> Such summary proceedings in the case of collection of taxes are constitutional. *McMillan v. Anderson*, 95 U. S., 37.

certain occupations without having resort to any judicial authority. This method of executing the will of the state by the direct act of the administration itself may be called, in analogy with the action of the courts in enforcing their decrees, execution, and in distinction from their action, administrative execution. In all countries, as has been indicated, this is the method adopted to enforce the payment of direct taxes. The administration steps in and of its own accord, without the intervention of any other authority, seizes the property of the delinquent taxpayer.<sup>1</sup> This it is then allowed to sell, subject often to the owner's right of redemption. After deducting from the proceeds of the sale the amount due the government, it must either return the residue, if any, to the owner if he can be found or if he cannot be found, must keep such residue in trust for him. This is often the case in the United States where ordinarily administrative execution is rare.<sup>2</sup> This same method of administrative execution is also adopted in some countries for the enforcement of most money payments due the government,<sup>3</sup> but as a usual thing this is not the case in the United States<sup>4</sup> except in the case of the collection of taxes where the administration is regarded as peculiarly representative of the sovereign. In the other cases of sums of money due the government, either because the administration is not regarded

<sup>1</sup> In Germany, however, landed property can be seized only as a result of the action of a court. Stengel, *Deutsches Verwaltungsrecht*, 195.

<sup>2</sup> See *e. g.* N. Y. L. 1882, c. 410, secs. 926-954.

<sup>3</sup> So in France, Ducrocq, *op. cit.*, II., 263 *et seq.*; Germany, Civ. Proz. Ord., secs. 708-768.

<sup>4</sup> But see *Murray's Lessee v. Hoboken Land and Improvement Co.*, 18 How., U. S., 272 which holds that such a method is due process of law even in the case of debts due the government.

as so representative of the sovereign or because it is felt to be unsafe to give the administration such wide powers, the law requires that the administration shall go before a court of competent jurisdiction, present its case there, and trust to the action of the court to execute the will of the state. In the case of a contract the government is regarded as simply a juristic person having no greater rights than ordinary persons except perhaps that it may be given the position of a preferred creditor; in the case of the enforcement of a penalty the administration is regarded as simply the prosecutor, and the actual execution of the will of the state is left to the courts, which may thus, if they see fit, greatly retard the action of the administration and exercise a wide control over it.

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## CHAPTER IV.

### THE SOCIALISTIC ACTION OF THE ADMINISTRATION.

The foregoing chapter presupposes some positive action on the part of the administration in the direction of limiting the sphere of individual liberty ; action from which results a relation of antagonism between the administration and the individual, who must, however, ultimately submit to its demands. The forms and methods of action resulting from this relation of antagonism are commands and the application of force to overcome resistance. In these cases of the expression or execution of the will of the state the administration has been considered as the representative of the sovereign power, and as entering into what may be called legal relations with individuals. The powers of the administration and the forms and methods of its action in the exercise of its powers are not, however, exhausted in the enumeration which has already been given ; for the function of administration is the realization of the ends of the state. The administration is to assist in widening the circle of human enjoyment and enlarging the scope of human opportunity as well as in limiting the sphere of individual liberty ; is to aid man in his conflict with nature as well as order his relations with his fellow-man.<sup>1</sup> It must offer to the inhabitants

<sup>1</sup> Cf. Stengel, *Deutsches Verwaltungsrecht*, 172.

of the state means of communication, must bridge rivers, construct highways, and carry the mails; it must protect the coast against the action of the sea; must keep the records of legal transactions, such as deeds and mortgages, on whose correctness and accuracy depends the validity of titles to property; it must issue patents and charters, by which new rights are created; the administration must in fact do everything which individuals cannot accomplish or cannot accomplish advantageously. In all of these cases it is seldom that the administration acts as the representative of the sovereign; seldom that it enters into hostile or antagonistic relations with individuals, for the purpose of its action is not here as in the class of cases enumerated in the preceding chapters to circumscribe the liberty of action of the individual, to make him yield something in order to further the general well-being; its purpose is on the contrary to offer directly to individuals some particular advantage by which they may profit. While in all cases the action of the administration is, or should be, intended to promote the public welfare, it accomplishes this end in the two classes of cases by totally different means. In the one it acts by repression, in the other by the direct tender of some service. The natural result is that the methods and forms of its action will be quite different in the different cases. In the one class, the form of its action is a command and its enforcement, in the other it is a rendering of a positive service to the individual upon his initiation and his compliance with the proper preliminaries. Thus the individual need only properly direct and stamp mail matter and tender it to the administration and the administration will transmit it to

the proper address; he need only present a deed or a mortgage properly acknowledged, and on tender of the fee fixed by law the administration will record it; he need only apply for a patent for a new invention which will be given to him if he has complied with the conditions laid down in the law. The form which the action of the administration will take in these cases will be either that of contract which is usually, however, governed by peculiar rules,<sup>1</sup> or of a certificate or authentication which, if official in character, will be taken judicial notice of by the courts.

Further in order to perform many of these duties, as indeed to perform any other of its multifarious duties, the administration must have an acquaintance with the relations into which it enters. Sometimes the necessary acquaintance is obtained by simple observation. Simple observation is all that is necessary to determine the existence of a nuisance, the necessity of laying out a new highway, or of the construction of a bridge. But at other and most times more complicated conditions must be examined, the effect of laws and institutions must be discovered, a vast amount of information in regard to social phenomena must be obtained before the administration or even the government as a whole can wisely proceed to act. In many cases physical laws and natural forces must also be studied and information as to their workings must be collected. For though the government comes mainly into contact with human beings, it regulates their relations often only in the hope of bringing the individual into harmony with his environment; in other words it forces him to obey natural forces and laws. The government directs the

<sup>1</sup> *Supra*, I., p. 10.

mode of human life and limits the freedom of individual action, but it does this only with the desire of improving the moral and sanitary conditions of the people. In order to accomplish this duty the government must understand what conditions are provocative of evil ; what environment is favorable to the spread of disease. The necessary understanding cannot in these instances be obtained through simple observation. Resort must be had to some other means of acquiring information. Investigations must be held, testimony must be taken, experts must be heard, long series of statistics must be collected and examined. Of course these are not means exclusively used by the administration or the government. Courts hear testimony, legislatures make investigations, and statistics are gathered by private persons and associations, and are used by them to prove and disprove every imaginable proposition. The collection of information and statistics is not therefore a characteristic function of administration or even of government ; nor will the form of the action of the administration in these cases be peculiar or different from that of the action of private bodies with the single exception that the results will be more readily believed and are, not infrequently, presumed to be true in official proceedings. There is a large class of statistics, however, a certain kind of information which governmental organs alone can in the nature of things collect, partly because of the immensity of the task, partly because it is often necessary, in order to obtain such information and to collect such statistics at all, to apply force or at least to provide that the power to apply force exist, and the government is the only organization in a well ordered community to

which the application of force can safely be entrusted. The organ of the government which is peculiarly fitted to perform this duty of acquiring information and collecting statistics is the active organ of the government, that is the administration. It is also the only organ properly organized for this purpose. But though it is the best fitted to perform this duty, it does not by any means confine its activity in this direction to the collection of those statistics and that information which will be of immediate use to it alone. On the contrary the administration is or should be the permanent collector of much information and most statistics which are made use of by the other departments of the government whose action, as has been shown, must be based on a wide knowledge of facts and relations, and by the people at large in their search for social and economic laws and for the causes of and remedies for existing conditions.

This kind of administrative activity, whose purpose is the direct furtherance of the social welfare, may be called socialistic in distinction from the governmental activity whose forms and methods were analyzed in the preceding chapters and in which the administration is to be seen representing the sovereign power of the state. Its forms and methods are not peculiar to governmental activity, but are in the nature of contracts, of decisions arrived at by synthetical processes. It is, however, necessary to mention them in order to convey an adequate idea of the field of administrative activity, and of the forms and methods of administrative action.

# BOOK VI.

## THE CONTROL OVER THE ADMINISTRATION.

### *Division 1.—Methods of Control.*

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## CHAPTER I.

### FORMATION OF THE CONTROL.

#### *I.—Necessity of control.*

THE action of the administration, whose forms and methods have been described in the last book, is so important that it is impossible for any country possessing constitutional government to allow the administration perfectly free hand in the discharge of its duties. The public is so dependent upon the action of the administration that it is of the utmost importance that the administration shall be efficient. The administration attends to many things which it is impossible for individuals to attend to at all. If the administration does not perform its duties or performs them unwisely or inefficiently it will follow that these things will not be done at all or will be done in such a way that the results of administrative action will be of little value. Individuals also are so at the mercy of the administra-

tion that some protection must be offered to them against the violation of their rights. The administration is often thrown into relations with the individual citizens which must necessarily be hostile. It demands of them sacrifices which they regard as unreasonable or as not justified by the law of the land. Nearly all of the expressions of the will of the state which are to be carried out in their details and executed by the administration cause a conflict at times between the conception by the administration of what the public welfare demands and the conception by the individual of the sphere of private rights guaranteed to him by the law. If the administration had in such cases the power of perfectly discretionary and uncontrolled action, it is to be feared that individual rights would be violated. For the administration has back of it the entire force of the government. Of course it is the purpose of all administrative legislation to reduce as far as possible the realm of administrative discretion, to lay down limits within which the administration must move. But it is impossible to do this with such precision as efficiently to protect individual rights. The discretion of the administration cannot be completely taken away by legislation without causing its usefulness to be seriously impaired. Large discretion must be given to the administration in all states by the legislative authority, so large that some means of controlling the administration must be devised if private rights are to be maintained.

Finally the action of the administration should be such as will, as far as possible, promote the welfare of society at large. There are many cases where, though the action of the administration is not subversive of

the private rights of any particular person, it will still not be in accordance with the interests of society as a whole. Here again the discretion of the administration cannot, without diminishing greatly its powers of usefulness, be so controlled by legislation as perfectly to ensure the promotion of the public welfare. As before some other means must be devised of controlling the action of the administration more concrete in its character, more adaptable to particular cases.

For all of these reasons then it is desirable, indeed necessary, that there be formed some system of control over the action of the administration to the ends that such action be efficient, consider private rights, and promote the welfare of society at large.

## *II.—Interests to be regarded.*

The formation of such a system of control is as difficult as it is necessary, partly on account of the variety of the interests to be regarded, partly on account of the variety and continual recurrence of the administrative acts to be controlled. Analogies from other branches of the law must be used with caution, because each of these other branches of the law has as a rule regard for only one interest, and because the acts to be controlled are not so varied in kind. Thus private law aims at the maintenance of private rights, and at the observance of the law as laid down in the books; it seldom, at any rate so far as its application is concerned, has regard for expediency. Again criminal law aims at the attainment of good social conditions, while constitutional and international law aim primarily at the efficiency of government organization and the maintenance of state integrity



and power. Constitutional law does, it is true, aim also at the protection of private rights, in so far as it formulates a scheme of inviolable rights, but the remedies offered for their violation, and without which they are valueless, are to be found in the control over administrative action provided by the administrative law. If constitutional law formulates the rights, administrative law elaborates the remedies. Administrative law, on the other hand, endeavors to attain all these three ends, *viz.*, state integrity and power and efficient governmental action, the maintenance of private rights, and the attainment of good social conditions. Therefore we cannot rely on any one kind of control as in these other branches of the law. No system of private or even public actions will suffice to control the application of the administrative law and the action of the administration made necessary thereby, as it undoubtedly does suffice for the control of the application of private and criminal law. No system of administrative centralization or legislative control will suffice as in the case of international and constitutional law. On the contrary a well organized control over the application of the administrative law and over administrative action must make use of all these three methods of control, since the administrative law aims at governmental efficiency, individual liberty, and social well-being.<sup>1</sup>

In the formation of the control over the administration regard must be had then for the interests to be furthered by the administrative law. The first of these interests is that of governmental efficiency. Some method of control must be devised by which to force the officers of the administration to act in case they

<sup>1</sup> Cf. Gneist, *Das Englische Verwaltungsrecht*, 1884, Book II., Chap. 3, I.

neglect their duties, or to correct their action in case they act unwisely. As many cases may arise where the neglect of officials will not cause a serious violation of private rights but will simply tend to impair the efficiency of the administration, and as it is the interest of the government that its administration be efficient, this method of control should be so formed that it may be exercised by the organs of the government of their own motion and not simply at the instance of private persons.

The second interest to be regarded is the preservation of individual rights, the maintenance in its entirety of the sphere of freedom of individual action guaranteed by the law of the land. Some method of control must be devised by which the officers of the government may be prevented from encroaching upon this sphere. As this method of control is formed in the interest of the individual, it should be so formed that it may be exercised by the individual, who should be allowed to appeal to impartial tribunals from the acts of the administration which, he believes, violate the rights assured to him by the law. Such impartial tribunals are found in the courts as at present organized in all civilized countries, which in various ways may be given the power to prevent encroachment by the administration on the domain of private rights.

The third interest to be regarded by the administrative law is the social well-being. There must be some method of control devised which will force the administration in its action to keep before its mind always that it is not a law unto itself, that one of the great reasons of its existence is the promotion of the social welfare. Such a method of control should be so organ-

ized as to allow that body which primarily represents society in the government, *i. e.* the legislature, to step in and compel the administration to regard the interests of society.<sup>1</sup>

*III.—Kinds of control, and particularly the administrative control.*

There are thus three pretty distinct interests to be regarded and there should be three pretty distinct methods of control, each of which aims primarily at the protection and consideration of one of these three interests. These three methods of control which we find in all states in various stages of development and perfection are called, respectively, the administrative control, the judicial control, and the parliamentary or legislative control, their names being derived from the authority which exercises them.<sup>2</sup>

1. *The administrative control.*—We have in the first place the administrative control. This is exercised primarily in the interest of governmental efficiency, though it may be used subsidiarily in the interest of the protection of private rights and the furtherance of the public welfare. Its main endeavor is to obtain harmony in administrative action, efficiency in the service in general, and uprightness and competence in the officials. It is exercised, as its name implies, by the higher officers of the administration over the actions of their subordinates. It is thus really a sort of self-control, and its extent depends altogether upon the degree of administrative centralization present in the administrative system. It has thus been sufficiently

<sup>1</sup> See Gneist, *Das Englische Verwaltungsrecht*, 1884, 320 *et. seq.*

<sup>2</sup> *Ibid.*

treated in the discussion which has been had of the organization of the administration. Its existence must be noticed, however, in this connection, since if it is well developed it will not be necessary to develop so fully the other means of control. But where the administrative control is not developed, *i. e.* where the administration is not somewhat centralized, it will be almost useless to expect any great efficiency. Administrative efficiency may, of course, be sought in some other way, but the main means of obtaining it is through centralization and an administrative control. When analyzed, this administrative control will be found to consist of a disciplinary power,<sup>1</sup> and a power of supervision possessed by the higher administrative officers over the lower administrative officers. Reference to what has been said in regard to administrative organization and particularly to what has been said with regard to the relations of the central administrative authorities with the administrative authorities in the localities will show that the administrative control exists hardly at all in the United States outside of the national administration, where it is quite strong and seems to be growing stronger; that the national administration has practically no control over the administration in the various commonwealths; that the central administrative authorities in the commonwealths have little control over the localities or the administrative authorities in the localities; and that the only localities where the administrative control of the chief local authority over the other authorities is at all well developed are the cities. In England, where the condition of the administrative control was

<sup>1</sup> *Supra*, II., p. 86.

at one time very much the same as in the United States commonwealths at the present time, there has of late years been considerable change. Since 1834, and as a result of the reforms in the local government system, the administrative control has been very much strengthened, particularly that of the central over the local authorities.<sup>1</sup> On the continent, however, the administrative control is very highly developed. The control of the central administrative authorities over the localities and local authorities is very great, and as a result of the concentrated character of the local government system, the control of some one local authority over the other authorities in the same locality is a strong one.<sup>2</sup> But while in England the tendency has been since 1834 to increase the administrative control of the central authorities over the localities, on the continent the tendency has been just the other way, *i. e.* towards decentralization and local self-administration. Finally it is to be noticed that in the federal government of the German Empire, as in the federal government of the United States, the national, *i. e.* the imperial, government has no administrative control over the administration of the various members of the empire.

2. *The judicial control.*—We have in the second place the judicial control. This is exercised by the courts and primarily in the interest of the individual for the protection of his rights, but it may be made use of subsidiarily in the interest of administrative efficiency. By its means individuals may prevent the administration from violating their rights and from making any misapplication of the administrative law.

<sup>1</sup> *Supra*, I, pp. 259 *et seq.*

<sup>2</sup> *Supra*, I, pp. 266–338.

3. *The parliamentary or legislative control.*—This is exercised primarily and, it may be said, almost exclusively in the interest of the general social well-being, and is exercised by the legislature or its committees.

Every constitutional state has formed the control over its administration out of these three elements. But the strength of each of these elements in the different states varies greatly in accordance with the relative prominence of the end sought in the formation of the control, and indeed the whole body of the administrative law. In one country, as for instance in Germany, we find that the end aimed at in the administrative law and in the control over the administration is the efficiency of the government, and therefore that the administrative control is very great, *i. e.* the administration is highly centralized while the judicial control is comparatively weak; in another, as for instance in the United States, the end mainly sought is the maintenance in its integrity of the sphere of individual rights. Therefore the administration is quite decentralized and the control of the courts over it very great. As the administrative control has been sufficiently considered in what has already been written we will proceed at once to the discussion of the judicial control.

## *Division II.—The Judicial Control.*

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### CHAPTER I.

#### ANALYSIS OF THE JUDICIAL CONTROL.

##### *I.—Use of ordinary judicial institutions.*

The judicial control may be largely ensured by making use of ordinary judicial machinery and by the application of the ordinary rules of law to the officers of the administration who are to be controlled. Thus the government may be regarded as a juristic person when it makes contracts or commits torts, and then considered as a subject of private rather than public law. If it is so regarded, the ordinary means of enforcing contracts and redressing wrongs in the case of private persons may be adopted in the case of the government. Again the officers of the government may be treated as private persons and apart from their official capacity; and their acts done under color of office but not in accordance with the provisions of the law may then be treated like the acts of private persons and subjected to the control of the ordinary courts. If without jurisdiction they have injured individuals they may be made responsible to such individuals in damages. Analogies may also be drawn from the criminal

law. Many of the rules of administrative law may be put into the form of absolute unconditional commands to the persons in the obedience of the state to do or to refrain from doing particular things, and the violation of such rules of law may be made punishable criminally; the application of the penalties may be entrusted to the ordinary courts which, before inflicting them, will have to decide as to the criminality of the act and will thus exercise a control over the action of the administration when it endeavors to enforce the penalties. Further the ordinary misdemeanors of officers as well as the violation by them of their administrative duties may be punished in the same way. In all of these cases the law, in order to form a judicial control over the administration and its officers, makes use of the ordinary judicial machinery and applies to the administration the ordinary rules of private and criminal law. For many of the rules of administrative law such methods of control will be sufficient, since the action of the administration in applying them will be of such a character that it will be subject to judicial supervision. Thus the wrongful use of governmental power by officials to the detriment of particular individuals will in many cases be prevented by the fear of incurring a liability for damages caused by the wrongful act or of criminal punishment. Especially will this method of judicial control be sufficient in the case of all rules of administrative law which are put into the form of absolute unconditional commands.<sup>1</sup> The power which the courts have to refuse to enforce the penalties for their violation, in case the administration has endeavored to act illegally, will preclude the possibility



of permanent illegal administrative action. For the action of the administration in such cases consists simply in prosecuting the violation or supposed violation before the police or criminal courts which usually form a part of the ordinary judicial system. The administration has no discretion to exercise and its action neither needs nor admits of the exercise of any further control in the interest of private rights. These rights have been completely safeguarded in the first place through the complete expression of the will of the state by the legislature, and in the second place by the designation by the legislature of this means of their execution. But in certain other cases the action of the administration is not of such a character as to permit of its being brought under the control of the courts by the use of such ordinary judicial institutions and by the application to the administration of the ordinary rules of private or criminal law. In these cases it becomes necessary, in order that the judicial control shall have any value, that there be formed a special jurisdiction of some sort.

## *II.—Administrative jurisdiction.*

It has been shown that it is impossible in all instances to resort to the method of putting the rules of administrative law into the form of absolute unconditional commands, that in many cases it is absolutely necessary to have recourse to conditional relative commands,<sup>1</sup> commands in which the legislature simply lays down the general conditions of administrative action, in which the legislature leaves to the administration the expression of the will of the state in the minor

<sup>1</sup> *Supra*, II., p. 109.

details, and allows it in its discretion to ascertain the existence of the conditions necessary for its action in the execution of them. Where the administration has, in order to execute these rules of administrative law, to apply to the courts (*i. e.* where the method of administrative execution has not been provided) no special judicial control is in many cases necessary though it may often be provided. For the courts, as in the case of the imposition of penalties for the violation of the absolute unconditional commands, may, when the administration applies to them for the power to put its orders into execution, refuse to grant it the power on the ground that the case before it is not one of the cases provided for in the law; and in this way exercise a sufficient control over it. But for all cases where administrative execution is provided or where the action of the administration is not reviewable collaterally by the courts, which is usually the rule,<sup>1</sup> some method must be devised which will ensure that the administration shall act only in the cases and only in the way in which the law has said that it shall act. The special judicial control thus formed may be called and in most states is called an administrative jurisdiction because it is a special jurisdiction of judicial bodies over the acts of the administration.

### *III.—Kinds of judicial control.*

The judicial control thus proves, on analysis, to be of a threefold character. In the first place it is exercised by the civil courts, first, in the power which is almost everywhere given to them to entertain suits of

<sup>1</sup> Cooley, *Taxation*, 2d Ed., 260, and cases cited.

a private legal character against or by the government or some of the public corporations within the government; and, second, in the power which in nearly all countries is given to the courts to entertain suits against officers of the administration for the damages which they may have caused by their illegal acts or the negligent performance of their duties.

In the second place the judicial control is exercised by the criminal courts, first, in the power which they have to pass upon the validity of the acts of the administration when an individual is prosecuted before them for the violation of these acts or of the law which the administration seeks to enforce; and, second, in the power which they have to punish officials for the commission of ordinary crimes or for the criminal violation of their official duties.

In the third place either there have been formed special courts, or there has been given to the ordinary courts a special jurisdiction, to hear appeals directly against the acts of the administration, *i. e.* an administrative jurisdiction. As a result of the possession of the administrative jurisdiction these courts may often annul or amend the acts of the administration which are complained of.

All systems of administration make use of these different methods of judicial control but the combinations of the different elements of which the judicial control consists, will be found different in the different countries. It will now be our purpose to ascertain what exactly is the combination, and the reasons therefor, that has been made in each of the countries whose law is being examined.

## CHAPTER II.

### CONTROL OF THE CIVIL COURTS.

#### *I.—Suits by or against the government.*

The power of the courts to entertain suits in contract or tort, to which the government or one of its local corporations is a party, depends upon the extent to which the government in its central or local organization is recognized as possessing corporate rights and as subject to corporate liabilities, upon how far the government is to be treated as a juristic person. As a general rule of law it may be said that the government is a juristic person so far as its power to sue is concerned,<sup>1</sup> but it is not fully settled in all countries that it is to be treated as a juristic person in the case that the wrong or breach of contract is committed by its officers.<sup>2</sup> The idea that the government cannot be sued in the ordinary courts seems to have arisen from the application of the principles of the Roman law,<sup>3</sup> and the adoption of the monarchical principle that the "sovereign can do no wrong." While this rule seems

<sup>1</sup> Cf. Dillon, *Municipal Corporations*, 4th Ed., I., 55; see also *United States v. Maurice*, 2 Brockenbrough U. S., 96, 100, 101, Opinion by Marshall, C. J.; *U. S. v. Tingey*, 5 Peters, 115; *U. S. v. Bradley*, 10 Peters, 343; *Dugan v. U. S.*, 3 Wheaton, 172.

<sup>2</sup> Dillon, *op. cit.*, I., 55.

<sup>3</sup> Cf. Mommsen, *Römisches Staatsrecht*, 2d Ed., I., 170, 679; II., 712.

to have been at one time quite universally adopted in European states, on the continent, on account probably of the complete conception of a public corporation, it received later such modifications as to put the government in almost the same position as an ordinary corporation, it being called *fiscus*, being made a subject of private law and entering into almost all private legal relations.<sup>1</sup> Further in order to facilitate the action of the government as a subject of private law, in all countries, both in those following the old rule that the sovereign can do no wrong and therefore may not be sued in the courts and in those which follow the later continental rule by which the government is regarded as *fiscus* and as entering into private legal relations, many of the local organizations of the government are incorporated, are able to sue and are liable to be sued in the civil courts. On account of these facts it is necessary to consider the control of the courts over the administration in this matter of suits by or against it, from the standpoint of the individual and from that of the government, and also from the standpoint of the central government and from that of the local governmental corporations.

1. *Suits by the government against individuals.*—As far as the local corporations are concerned it may be said that they occupy as plaintiffs in a suit against individuals just about the same position that individuals occupy. In all private law suits they are in the same position as mere private corporations. Of course in many instances there are certain formalities which must be complied with by certain of these municipal corporations before they can bring the suit, and some-

<sup>1</sup> See Sarwey, *Das Öffentliche Recht*, 398.

times before they can defend a suit, as *e. g.* in France where the consent of the council of the prefecture is necessary; but such limitations form rather a part of the formalities of administrative action and procedure than a part of the control of the courts over the administration. When, however, we come to the central government we find that its position as representative of the sovereign does have quite an appreciable effect in several instances on its position as plaintiff in the courts. In some cases, as has been indicated, its position as representative of the sovereign is carried so far as to permit it to enforce claims, which are liquidated in amount, against individuals without recourse to the courts at all and by means of administrative execution.<sup>1</sup> In such cases the only control that the courts can have over the private legal relations of the government is to be found in the possibility, which is often present, to exercise their administrative jurisdiction at the instance of some individual against the enforcement of administrative execution. And even where administrative execution has not been adopted for the enforcement of government claims, where the government has to proceed in the enforcement of its claims very much as any ordinary suitor, it often has certain privileges which are not possessed by the ordinary suitor, as *e. g.* in England by the Crown suits act, or it occupies the position of a preferred creditor, its claims taking precedence of all other claims. In case the government sues it is generally admitted that the courts, even in those countries which do not permit suit to be brought against the government directly, will make allowances in their judgment for any counter-claim or set-off proved by the indi-

<sup>1</sup> See *Murray's Lessee v. Hoboken, etc., Co.*, 18 How., U. S., 272.

vidual who is defendant to the suit.<sup>1</sup> Use may not, however, be made of this power to give judgment against the government.<sup>2</sup>

2. *Suits against local corporations.*—As a result of the desire to facilitate the conduct of the private legal relations of the government many of the important localities, into which the state is divided, are regarded as juristic persons, and individuals may in all cases bring suits against them in contract and often in tort. There is, however, in the United States a distinction made between what are known as *quasi* corporations and full municipal corporations,<sup>3</sup> in accordance with which suits in torts, except when permitted by express statute, may not be brought against the former, inasmuch as they are agents of the central government, as such are in the eyes of the law incapable of committing a wrong, and therefore share in the immunity possessed by the sovereign whom they are regarded as representing.<sup>4</sup> Suits in tort may, however, be brought against the full municipal corporations since they are formed for the peculiar advantage of the inhabitants of the corporation and therefore may, like private corporations, be made, in the domain of private legal relations, subject to the rule of private law that the superior is responsible for the acts of his agents.<sup>5</sup> But it must be noticed that even full municipal corporations are not generally responsible for damages resulting from the execution of what are called governmental

<sup>1</sup> U. S. v. Macdaniel, 7 Peters, 16 ; *cf.* U. S. v. Ringgold, 8 Peters, 150, 163.

<sup>2</sup> U. S. v. De Groot, 5 Wall., 419 ; U. S. v. Eckford, 6 Wall., 484.

<sup>3</sup> See *supra*, I., p. 202.

<sup>4</sup> Morey v. Town of Newfane, 8 Barb., 645, 648 ; *cf.* Hill v. Boston, 122 Mass., 344. See *supra*, I., p. 173.

<sup>5</sup> Dillon, *Municipal Corporations*, 4th Ed., I., 45 ; Bailey v. Mayor, *etc.*, 3 Hill, N. Y., 531.

powers in contradistinction to their private powers.<sup>1</sup> Further, while the local corporations may thus be sued and judgment obtained against them in the usual way, it is to be noticed that such judgment is not commonly collectible in the usual way, *i. e.* by sale on execution of the property of such corporations. For such a method would interfere too much with the carrying on of the governmental powers which are generally conferred on these corporations. The usual means of enforcing a judgment against one of these local corporations is to apply to the proper authority, in case the administrative control has been adopted, then to the supervisory administrative authority, in case this is not the method, then to the courts for the exercise of their administrative jurisdiction, to force the proper local authority to insert the necessary appropriation in its budget and to provide by tax or otherwise for the payment of the judgment. The former method is the one usually adopted in France,<sup>2</sup> the latter is the method in the United States.<sup>3</sup> In Germany, however, in some places the law permits execution to issue in somewhat the usual way, the reason being probably that the localities possess as juristic persons a large amount of property which is of a purely fiscal character and is not made use of for the various administrative services carried on by the local corporations.<sup>4</sup> Such is the case also in some of the commonwealths of the United States.<sup>5</sup>

<sup>1</sup> *Ibid.* ; see also Cooley on *Taxation*, 2d Ed., 816.

<sup>2</sup> Boeuf, *op. cit.*, 229, citing Avis du Conseil d'État of the 12th of August, 1807.

<sup>3</sup> *E. g.* see N. Y. Rev. Stats. Part III., Chap. VIII., Title IV., art. fourth, secs. 102-4 ; *cf.* Dillon, *op. cit.*, II., 1028 ; Alden v. Alameda Co., 43 Cal., 270.

<sup>4</sup> Sarwey, *Das Oeffentliche Recht*, 300

<sup>5</sup> Dillon, *op. cit.*, I., 673.



3. *Suits against the central government.*—While the rule in regard to suits against the local corporations is, on account of the possession by the localities of juristic personality, much the same everywhere, *viz.*, that they may be sued in private law matters at the instance of the individual and that suits are brought in the ordinary courts, when we come to the matter of suing the central government we find much less similarity. We find that there is an English rule and a continental rule.

a. *The English rule.*—The English law, basing itself upon the principle that the sovereign can do no wrong, and believing that when the government enters into private legal relations the sovereign acts through it, denies in principle to the individual the right to sue the central government, except with its consent or in the special way which the government may have indicated.<sup>1</sup> This rule which formed a part of the common law was introduced into this country after the formation of an independent government here,<sup>2</sup> although from the beginning the sovereign has here been separated from the government, and therefore when the government was acting it was not the case that the sovereign was also acting. In England, to prevent this privilege of the government from resulting in gross injustice, the individual was from time immemorial allowed respectfully to petition the Crown, which was historically the sovereign, that right be done him. Such a petition was called the petition of right.<sup>3</sup> It is now provided <sup>4</sup> that the petition of right shall be left with the

<sup>1</sup> Gneist, *Das Englische Verwaltungsrecht*, 1884, 375.

<sup>2</sup> Dillon, *op. cit.*, I., 55.

<sup>3</sup> It may be traced back as far as 14 Edw. III., c. 14, and perhaps even as far as *Magna Charta*.

<sup>4</sup> 23 and 24 Vict., c. 34.

home secretary. It is then submitted to the Crown, which acts on the advice of the attorney-general. If he thinks that the statement of facts contained in it is sufficient to give a ground of action, he advises the Crown that it be granted and is responsible to Parliament for the advice which he gives. In case he advises that the petition be granted he writes on it the words *soit droit fait* and the petition is then heard and decided by the royal courts. By this method it will be noticed that the administration has the power to refuse the individual the right to sue the central government in the courts but must assume to Parliament the responsibility for such refusal, which fact may check arbitrary and inconsiderate action. The weak judicial control is thus in this instance reinforced by the parliamentary control. Several cases have delimited the scope of the petition of right. Among them may be mentioned that of the *Viscount Canterbury v. Attorney General*,<sup>1</sup> which holds that the government may not through the petition of right be made responsible for the tortious acts of its agents.<sup>2</sup> But it is believed that where an officer is mulcted in damages for carrying out the orders of his superior, the government is morally bound to indemnify him and is thus, morally at least, responsible for the torts which it itself commits.<sup>3</sup> Such a moral obligation is sometimes made a legal one in the cases of unjust enrichment by officers, as in the case of the payment by the importer on the demand of the collector of customs of more than the legal duties. Here suit may be brought by the indi-

<sup>1</sup> 1 Phillimore, 306.

<sup>2</sup> The same rule is adopted in *Tobin v. The Queen*, 16 C. B. N. S., 310.

<sup>3</sup> Todd, *Parliamentary Government*, 2d Ed., I., 496.

vidual against the collector, and the government is by law obliged to reimburse the collector.<sup>1</sup>

b. *The rule in the United States.*—In this country the method of the petition of right to the executive was felt to be inapplicable inasmuch as the executive was not historically the sovereign. The practice was for the individual to petition the legislature, which in the commonwealths had the residuary governmental power, and in all cases the power over the public purse.<sup>2</sup> If the petition was regarded as well founded a special appropriation bill was passed which was mandatory upon the treasury.<sup>3</sup> In the national government this practice has undergone considerable modification. Congress saw that it was beyond its power to make a thorough investigation of all the claims which were brought before it, that this method of settling claims practically devolved upon it a vast amount of work which was really judicial in character and for the performance of which it was unfitted. Therefore in 1855 an act was passed<sup>4</sup> providing a court for the investigation of claims against the United States government, based upon a law or contract. At first its decisions had no legal effect whatever, since they were drawn up in the form of a bill which was afterwards to be laid before Congress for its approval. The act was then amended so as to make the court of claims a real court whose judgments were of themselves mandatory upon the secretary of the treasury and binding upon the individual suitor and were to be paid from

<sup>1</sup> 39 and 40 Vict., c. 35.

<sup>2</sup> Cf. *O'Hara v. State*, 112 N. Y., 146; *People v. Stephens*, 71 N. Y., 527, 540, 548.

<sup>3</sup> *Kendall v. United States*, 12 Peters, 524.

<sup>4</sup> 10 Stats. at Large, 612.

any general appropriation for the payment of private claims. Appeal might be taken from them to the United States Supreme Court.<sup>1</sup> This court of claims has not, however, the same powers as an ordinary United States court. Thus it has, as a general rule, no equity jurisdiction.<sup>2</sup> It has also no jurisdiction over torts committed by the government,<sup>3</sup> although, in order to render justice, it will stretch its jurisdiction by means of the *quasi* or implied contract doctrines so as to embrace matters which bear a strong resemblance to tortious acts.<sup>4</sup> The jurisdiction of the court of claims is thus mainly one of suits in contract. In such suits the court may in its decision take account of any set-offs or counter-claims which the government may have against the individual bringing suit, so that the decision may result in a judgment against, instead of in favor of, the individual suing. The law organizing the court of claims also provides that the court may act as an advisory body to Congress or to the executive departments of the government in the settling of other kinds of claims.

Cases before the court of claims are conducted generally in accordance with the ordinary rules of law governing the matter of contracts between private individuals, though the procedure is somewhat different from that had before the ordinary United States courts, and though the government occupies a privi-

<sup>1</sup> 12 Stats. at Large, 865.

<sup>2</sup> Bonner v. U. S., 9 Wallace, 156; U. S. v. Jones, 131 U. S., 1.

<sup>3</sup> Gibbons v. U. S., 8 Wallace, 269; Morgan v. U. S., 14 Wallace, 31; Langford v. U. S., 101 U. S., 341.

<sup>4</sup> See 4 Ct. of Cl., 248; 14 *Ibid.*, 396; see also U. S. v. Great Falls Mfg. Co., 112 U. S., 645, where it was held that if the government took land to which it asserted no title there was an implied contract to pay for it. So also in a case of a patented invention, U. S. v. Palmer, 128 U. S., 262.

leged position. Thus the government always has the right to appeal, the individual only in specified cases. Where an excessive claim is fraudulently and wilfully made the whole claim is lost. This is true also in case false evidence is adduced. The judges also decide questions both of law and of fact; there is no jury. The procedure in the court of claims is largely in writing, for the ease of the suitors in the court who, were they obliged to appear in person, might be obliged to come or send counsel a great distance, since the court sits only at Washington.<sup>1</sup> The work of the court of claims has been so satisfactory and the permission to the individual to sue the government has resulted in so little inconvenience to the government that a late act of Congress has provided that individuals having claims against the government, based on a law or contract and under a certain amount, may bring suit against it in the district or circuit courts of the United States, which is then tried without a jury.<sup>2</sup> Finally there are one or two special courts for special classes of claims; *e. g.* court for French spoliation claims and court for private land claims.<sup>3</sup>

It will be noticed that by a gradual development of about thirty years we in the United States have departed from the rule that the individual cannot sue the national government, and have now practically adopted the rule in force in continental Europe. The government is conceived of as a juristic person, which may enter into private legal relations of a contractual character,

<sup>1</sup> For the procedure and the general rules governing the court see an article in the *Southern Law Review*, written by one of the justices of the court (Judge Richardson) and reprinted in vol. xvii. of the reports of the court of claims.

<sup>2</sup> 24 Stats. at Large, 505, 1887.

<sup>3</sup> L., June 20, 1888, March 3, 1890.

and is then liable to be sued in the ordinary courts. We have made this change through the medium of an advisory body to Congress, which was changed into a special court for the trial of claims against the government. But while we have thus adopted the continental rule that the government may be sued before the ordinary courts in contract we have not as yet adopted the rule that the government is ever responsible to the individual for torts committed by its officers.<sup>1</sup> By a special statute the government is made responsible for the judgments obtained by individual taxpayers where they have paid on the demand of the collectors of internal revenue more than the taxes required by law. Here the individual may sue the collector and the government is bound to pay the judgment.<sup>2</sup> This is, however, on the theory of unjust enrichment rather than tort.

In the commonwealths of the United States this development has not generally taken place. The old practice seems to obtain. The individual desiring to enforce a claim against the government must appeal to the legislature and get a special appropriation bill passed. Here as in the case of the national government the commonwealth is not responsible for the torts of its officers.<sup>3</sup> In some of the commonwealths, however, the first step in the development noticed in the United States government has taken place. In thirteen of the commonwealths the constitution provides that the legislature shall provide a method by which suits may be brought against the government.

<sup>1</sup> *Gibbons v. U. S.*, 8 Wallace, 269; *Langford v. U. S.*, 101 U. S., 341.

<sup>2</sup> U. S. R. S., sec. 3220.

<sup>3</sup> *Clodfelter v. State*, 86 N. C., 51; *Lewis v. State*, 96 N. Y., 71.

In five, however, this is forbidden by the constitution.<sup>1</sup> In others, while the constitution is silent on this point, the legislature has provided a method of suing the government. Thus in New York the legislature has provided an advisory body for the purpose of investigating claims against the government, from which appeal may be taken to the highest judicial court and which is to report its decisions to the legislature for action.<sup>2</sup> In other commonwealths the legislature has permitted the individual to sue the government in the ordinary courts.<sup>3</sup> In the commonwealths, however, the same need of the power of suing the government is not felt as in the national government. For the commonwealth system of administration is so decentralized that it may safely be said that most of the contracts made by the administration are made by some one of the local corporations which possess so many of the powers of government. Thus, notwithstanding the rule that suits may not be brought against the central government of the commonwealth, which may be subject to no exceptions, most of the contractual acts of the administration are subject to judicial control in that they may be made the subject of suits in the courts through the power of the courts to entertain suits against the local corporations.

Finally it is to be noticed that, while the government is not responsible for the tortious acts of its officers in the domain of either public or private law except in the case of the local corporations, still it seems to be recognized that it is not only in its local

<sup>1</sup> Stimson, *op. cit.*, sec. 75.

<sup>2</sup> N. Y. L. 1883, c. 205; *cf.* Dillon, *op. cit.*, I., 55, and cases cited.

<sup>3</sup> See *Clodfelter v. State*, 86 N. C., 51.

corporate organizations, including municipal corporations, but also in its central organization permitted to indemnify its officers for liability which they may incur in the *bona fide* discharge of their duties, and may raise money for that purpose.<sup>1</sup>

c. *The continental rule*.—On the continent the rule is that the government is liable to be sued by an individual in contract and also in tort, where the tortious act is not committed in the performance of functions of a distinctly public legal character and where the fault of the officer causing it is not purely personal to himself but consists rather in bad service, in an order badly given, not understood, or imprudently or carelessly executed.<sup>2</sup> Thus the government would not be held responsible for damages caused by its agents in the collection of taxes while it would be if a ship were injured by the negligence of the officers of one of its men-of-war.<sup>3</sup> An example of the purely personal act of one of its agents for which the government would not be responsible would be found in the case of theft by him. While the general rule as to the responsibility of the government for its contracts and torts is the same in France and Germany, the courts before which such suits should be brought are different. In France while the common law rule in the absence of statute would appear to be that the ordinary civil courts have jurisdiction, so many special statutes have, as a matter of fact, been passed giving the jurisdiction to the administrative courts that it is laid down as the

<sup>1</sup> Mechem, *op. cit.*, sec. 879; *cf.* Tracy v. Swartout, 10 Peters, 80.

<sup>2</sup> Ducrocq, *Droit Administratif*, secs. 1055 *et seq.*; Laferrière, *La Jurisdiction Administrative*, II., 149 *et seq.*; Von Rönne, *Das Staatsrecht der Preussischen Monarchie*, III., 583, 584; Bornhak, *Preussisches Staatsrecht*, II., 47.

<sup>3</sup> *Cf.* Ducrocq, *op. cit.*, II., 230, citing a decision of the Council of State.



rule that the administrative courts are alone competent to declare the government a debtor.<sup>1</sup> In Germany, however, it is the ordinary courts which have jurisdiction of actions both in contract and tort against the government.<sup>2</sup> The German rule as to the court which has jurisdiction of these cases against the government seems to be by far the more logical, since the whole responsibility of the government is based upon the theory of its juristic personality, and of its capacity to enter into private legal relations of all sorts and the consequent possibility of its being held responsible before those courts which have in their hands the application of the private law. The reason for the adoption of the French rule is largely historical and is to be found in the great desire at the time of the revolution to free the administration from the control of the ordinary courts, which had shown themselves too anxious to protect vested rights and hamper the administration in the carrying on of the necessary reforms.<sup>3</sup> In both France and Germany the general rules as to the responsibility of the government before the courts which have been mentioned are sometimes modified by special statutes. Thus in France the responsibility of the government for damages resulting from the carelessness of the agents of the postal and telegraph services is very much limited and the action is to be brought before the ordinary courts.<sup>4</sup> In Prussia the government is made responsible for the negligence of its registrars of deeds and mortgages, notwithstanding the fact that the registration of land titles

<sup>1</sup> Ducrocq, *loc. cit.*

<sup>2</sup> Von Rönne, *loc. cit.*; Bornhak, *loc. cit.*

<sup>3</sup> *Infra*, II., p. 218.

<sup>4</sup> L., Jan. 25, 1873, art. 4.

is evidently a public legal rather than a corporate or private legal act.<sup>1</sup>

*II.—Suits for damages against officers.*

1. *The English rule.*—According to the original German law all officers of the government were subject to the law of the land in the same way as ordinary individuals, and were liable to be held responsible by the courts for their actions committed without authority of law, whenever such actions caused damage to individuals.<sup>2</sup> This principle seems to have been retained in England, its retention being undoubtedly aided by the character of the administrative system which was early adopted there. The English system of administration was of that kind which has been denominated the self-government system, *i. e.* a system in which the officers were absolutely non-professional in character. While in theory and on account of the early Norman centralization these officers were the officers of the Crown, still in later times they were not actually in close enough connection with the Crown nor in sufficient subordination to it to be invested with any of the attributes of irresponsibility which the law assigned to the Crown. On the contrary they were regarded simply as ordinary citizens, who for the time being were serving the government by the discharge of public functions and who after their time of service had expired would fall back again into the ranks of private citizens. The same rules were applied to them which were applied to ordinary citizens. They were not exempted in any way from the observance of the law on account of their official position. If during the period of their discharge

<sup>1</sup> L., May 5, 1872, sec. 29.

<sup>2</sup> Loening, *op. cit.*, 771-784.

of public functions they committed an act not justified by the law such act was regarded as *coram non judice*, *i. e.* as an act of a purely private and personal character for which, like any citizen, they could be held responsible before the ordinary courts.<sup>1</sup> The important question to be decided by the courts whenever the act of an officer came up before them was therefore the question of jurisdiction. Did the law give the officer the power to act as he had acted in the particular case or not?

It will at once be seen what an enormous power the courts had and have through the adoption of this principle over the acts of the administration. Any act of any officer may give rise to a complaint which the courts have to decide. In deciding these complaints the courts delimit the sphere of administrative competence in all its details in that they settle what is the jurisdiction of all officers of the government. What the actual extent of this control shall be, depends, however, upon the attitude of the courts. They may pass upon every act of every officer or they may limit their power by their decisions in the interest of an efficient administration, may leave something to administrative discretion which they will not attempt to control. This has been the tendency of their decisions both in England and the United States. In both countries they have in the first place made it practically impossible to sue in damages the most important officers of state, *i. e.* the heads of executive departments in both countries and in the United States, also the President and the governors. Mr. Todd says<sup>2</sup>:

<sup>1</sup> Mechem, *op. cit.*, 400 *et seq.*

<sup>2</sup> *Parliamentary Government, etc.*, 2d Ed., I., 494, 495.

It may be stated as a general principle, that in assuming on behalf of the Crown a personal responsibility for all acts of the government, ministers are privileged to share, with the Crown, in a personal immunity from vexatious proceedings by ordinary process of law, for alleged acts of oppression, or illegality in the discharge of their official acts. . . . Whether the alleged liability arises out of contract or out of tort, or from any matter of private individual complaint against a minister of the Crown, for acts done in his official capacity, the ordinary tribunals of justice will afford him special immunity and protection.

This does not mean that in no possible case can a suit be brought against a minister, but only that the courts are very careful not to extend their control so as to hamper the administration of public business by the ministers. In the United States the rule is practically the same. Up to 1870 there was only one action brought against the head of a United States executive department,<sup>1</sup> and since that time I know of no other case.<sup>2</sup> This case, which is our only precedent, was the case of *Stokes v. Kendall*<sup>3</sup> and was decided adversely to the plaintiff. It is extremely interesting as showing distinctly the attitude of the courts towards this class of cases. It was preceded by the case of *Kendall v. The United States*,<sup>4</sup> in which the same plaintiff as in the case of *Stokes v. Kendall*, had endeavored to obtain a *mandamus* against the postmaster-general. The Supreme Court there decided that a given act was not discretionary but ministerial in character, and therefore that a *mandamus* might issue; and seven years later, when the same plaintiff brought a suit for damages against the postmaster-general, the same Supreme Court held that this same act, which it had declared in the

<sup>1</sup> See 6 Court of Claims Reports, 177, 180.

<sup>2</sup> Cf. Mechem, *op. cit.*, sec. 608.

<sup>3</sup> 3 How., 87.

<sup>4</sup> 12 Peters, 524.

other case to be ministerial, was, when a suit for damages resulting from it was brought, a discretionary act and therefore that the postmaster-general could not be held liable for damages. The immunity thus granted to the highest officers of state does not really diminish the control possessed by the courts over the administration so much as at first sight it might seem. For these high officers must come into relations with individuals generally through the medium of their subordinates, and according to the English and American system such subordinates are generally responsible for their actions and are not protected by the fact that they have acted according to instructions from their superiors.<sup>1</sup>

A second limitation which the courts have placed upon their control over the action of the administration, through their power to delimit its sphere of competence, is to be found in the rule, that purely ministerial officers will not be held responsible for damages where they have followed instructions which are legal on their face and contain nothing which will apprise the subordinate that they have been issued illegally, and are not within the jurisdiction of the superior who issued them.<sup>2</sup> The weight of authority seems to be further in favor of the rule that a ministerial officer is relieved from all responsibility for the execution of orders fair on their face, even if he is satisfied that there are illegalities lying back of them.<sup>3</sup> The English law has gone further than the law of the United

<sup>1</sup> Tracy v. Swartout, 10 Peters, 80.

<sup>2</sup> Savacool v. Boughton, 5 Wendell, N. Y., 170; Erskine v. Hohnbach, 14 Wallace, 613, 616; Cooley on *Taxation*, 2d Ed., 797, and cases cited.

<sup>3</sup> *Ibid.*, 798, citing Webber v. Gay, 24 Wendell, 485; Wilmarth v. Burt, 7 Metcalf, 257; Watson v. Watson, 9 Conn., 140; Wall v. Trumbull, 16 Mich., 228; Cunningham v. Mitchell, 67 Pa. St.; see also Underwood v. Robinson, 106 Mass., 296.

States and has offered to officers, who are not ministerial in character, quite a large immunity from suits at the hands of individuals by making their defence very much easier.<sup>1</sup>

The responsibility of officers for damages before the courts is in neither the English nor the American law confined to the cases in which they have acted out of their jurisdiction. In many cases officers may be held responsible for damages arising from the non-performance or negligent performance of duties within their jurisdiction, or from bad faith. Here the courts have been guided in their formulation of the rules of their control over officers, by the character both of the officer and of the duties which he has to perform and which the court undertakes to control. Officers are for this purpose divided by the courts into judicial, legislative, and executive officers. In addition to these three classes of officers there is a fourth class of officers whose development has taken place during this century and whose duties partake of the characteristics of those of the three other classes of officers. These officers are called administrative officers. Such are the American supervisor and county commissioner and the English county councillor. Of these various classes of officers it may be said, in the first place, that purely judicial officers, *i. e.* officers that hold courts and decide cases of criminal and private law, and legislative officers will not be held civilly responsible for damages, no matter how gross their negligence may be, nor what may be the character of the act giving rise to the

<sup>1</sup> See 43 Geo., II. c. 44, sec. 6, cited in Gneist, *Das Englische Verwaltungsrecht*, 1884, 378. This provides that the justices of the peace and their subordinates shall be responsible only for nominal damages except when they have acted out of malice and without reasonable cause.

damages, provided it is within their jurisdiction.<sup>1</sup> The only possible exceptions to this rule are to be found in the case of the ministerial acts of *quasi-judicial* and *quasi-legislative* officers, when such officers act *quoad hoc* as administrative officers.<sup>2</sup> The responsibility of executive and administrative officers depends, however, largely on the character of the act which has caused the damage. If the duty, in the performance of which the act causing the damage was done, is discretionary in character, the general rule is that executive and administrative officers may not be made responsible since the courts do not like to interfere with the discretion of the administration. When, however, the duty is purely ministerial such officers may be held responsible by the courts for their negligence or mal-performance of such duty. As one judge says<sup>3</sup>:

The civil remedy for misconduct in office . . . depends exclusively upon the nature of the duty which has been violated. Where that is absolute, certain, and imperative, and every ministerial duty is so, the delinquent officer is bound to make full redress to every person who has suffered by such delinquency. Duties which are purely ministerial in their nature are sometimes cast upon officers whose chief functions are judicial. Where this occurs the officer, for most purposes a judge, is still civilly responsible for such misconduct. But where the duty alleged to have been violated is purely judicial a different rule prevails; for no action lies in any case for misconduct or delinquency, however gross, in the performance of judicial duties. And although the officer may not in strictness be a judge, still if his powers are discretionary to be exercised or withheld according to his own view of what is proper, they are judicial and he is exempt from all responsibility by action for the motives which influence him and the manner in which such duties are performed.

<sup>1</sup> Mechem, *op. cit.*, secs. 619, 644, with cases cited.

<sup>2</sup> *Ibid.*, secs. 635, 643, 647, and cases cited.

<sup>3</sup> See *Wilson v. The Mayor*, 1 Denio, N. Y., 595, 599.

There is, however, in the United States a tendency in the decisions to relax the strictness of this rule in the case of administrative officers, officers who, while not holding regular courts, exercise what are called *quasi-judicial* functions, so as to hold them responsible for bad faith and dishonest purposes notwithstanding the fact of the *quasi-judicial* and discretionary character of the duties which they perform.<sup>1</sup>

In respect to such cases, [says Judge Cooley] though they seem to be out of harmony with the general rule. . . . and the reasons on which it rests, yet we may perhaps safely concede that there are various duties lying along the borders between those of a ministerial and those of a judicial nature which are usually entrusted to inferior officers and in the performance of which it is highly important that they be kept as closely as possible within strict rules. If courts lean against recognizing in them full discretionary powers and hold them strictly within the limits of good faith it is probably a leaning that in most cases will be found to harmonize with public policy.<sup>2</sup>

2. *The Roman rule.*—While the English law, basing itself on the old German principle of the responsibility of all persons to the courts for the damages they committed unlawfully, gave the courts power to mulct officers in damages where their acts had been contrary to the law and in excess of their jurisdiction; the Roman law, starting out from the point of view of the government rather than from that of the individual, provided, in the interest of governmental efficiency, that the officers of the government could, during their term of office, be brought to account and made responsible for damages only with the consent of their

<sup>1</sup> Cooley on *Torts*, 411.

<sup>2</sup> *Ibid.*, 413; see also *Pike v. Megoun*, 44 Mo., 491.



superior officer.<sup>1</sup> The German principle of the responsibility of officers was at first adopted on the continent.<sup>2</sup> Soon, however, with the introduction of the Roman law, came the Roman principle of official irresponsibility.<sup>3</sup> In the Holy Roman Empire the powers of the imperial courts diminished so much as a result of the decay of the empire that it was impossible to enforce the responsibility of the various territorial lords, to the most important of whom a legal exemption from responsibility to the imperial courts was given by the grant of the *privilegium de non appellando*. The result was that at the time of the Reformation the monarchs and princes on the continent with all their agents were uncontrolled by the courts, which no longer had the power to hold them responsible for the damages which they might illegally inflict upon individuals.

The reason of the adoption among German peoples of this rule of law which seems so regardless of private rights is to be found in the needs of the administration at the time that it was adopted. The struggle with feudalism was at its height and it was the private rights of the feudal lords, or what they chose to consider as their private rights, which were most liable to violation on the part of the princes of the continent. Now the imperial courts in Germany and the royal courts in France were held by judges who were independent in tenure over against the Emperor, any given prince, or the King—in Germany because the judges were chosen by the estates, in France because the judgeships in the ordinary courts were bought and

<sup>1</sup> Mommsen, *Römisches Staatsrecht*, 2d Ed., I., 170, 629; II., 712.

<sup>2</sup> Loening, *Deutsches Verwaltungsrecht*, 771.

<sup>3</sup> *Ibid.* Parey, ; *Verwaltungsrecht*, I., 4, citing De Tocqueville, *L'Ancien Régime et la Révolution*, chap. 4.

sold and treated as private property. The retention of the principle of the responsibility of the royal and princely officers to the ordinary courts would therefore have effectually prevented the kings and princes from destroying the feudal system with all its abuses and pretended vested rights and would have made impossible the development of the national state upon the continent. In England the condition of things was quite different. There the officers of the royal courts were the paid servants of the King and subject to his disciplinary power.<sup>1</sup> They did not possess a tenure independent of the Crown till 1701, when the act of settlement provided that they should be removed only on the address of both houses of Parliament. The desire of the absolute monarchy to reduce the nobility to submission and to do away with feudalism was thus the cause of the adoption on the continent of the Roman principle that the officers of the government might be sued by the individual only after the consent of their superior had been obtained. In France this consent was to be given by the Council of the King which, before granting such consent, determined the question of jurisdiction, *i. e.* whether the officer had acted contrary to the law; and the suits had to be brought before special courts over whose organization the King had full power.<sup>2</sup>

The effect of the French revolution on the position of governmental officers was at first simply to increase their irresponsibility. Since the time of the revolution the position of officers in France has undergone a somewhat different development from that of officers in

<sup>1</sup> *Infra*, II., p. 193.

<sup>2</sup> See Laferrière, *La Jurisdiction Administrative*, I., 584, note 1.

Germany, though Germany has been influenced by what has been done in France. It will be necessary therefore to treat these countries separately.

a. *The modification of the Roman rule in France.*—The desire of the leaders of the revolution to carry on the reform work of the monarchy was so great<sup>1</sup> and their distrust of the courts on account of their attempts to protect the privileged classes in the latter days of the monarchy was so widespread<sup>2</sup> that little desire was felt of subjecting the administration, which was to carry on the reforms of the new era that had just dawned, to the control of the courts. Accordingly we find incorporated into article 75 of the constitution of the 22d of *frimaire an VIII* (1800), from which year date almost all of the permanent administrative results of the revolution, the principle which had come down to the absolute monarchy from the Roman law, *viz.*, that no individual could bring suit in the courts against an administrative officer until the Council of State, an administrative council, had decided that the officer had acted outside of his jurisdiction, and had given its consent to the bringing of the suit. In case such consent was given the suit was to be brought in the ordinary courts. But after the reforms of the revolutionary period had been completed this principle had outlasted its usefulness and remained only a menace to private rights. For use of it was made to destroy almost all fear in the minds of the officers of the administration that they would suffer pecuniary loss for violating their duties; and an important sanction for administrative integrity was lost. Article 75 was deemed by some of the best French public lawyers to

<sup>1</sup> See *supra*, I., p. 270.

<sup>2</sup> See *infra*, II., p. 218.

be unnecessary for the maintenance of the principle of the separation of powers and of its corollary, the independence of the administration, which are deemed so important by the French law.<sup>1</sup> As a result of the abuse of this principle by the government of the second empire, the French people decided to tear it out of their public law root and branch. Therefore after the overthrow of the government of the empire one of the first acts of the new government of the national defence was to repeal article 75 and all provisions of law depending upon it or of like import.<sup>2</sup> At first it was thought that this gave the ordinary courts the power to entertain suits in damages against officers, not only for purely personal acts, such as negligence, but also for acts done by them in connection with their duties but outside their jurisdiction; that the courts had as a result of the repeal of article 75 the same power as the courts in the United States have to delimit the sphere of administrative competence. But the principles of the separation of powers and the independence of the administration were too firmly imbedded in the French law to permit of their being shaken by the mere repeal of the necessity of obtaining the consent of the Council of State as a prerequisite to the bringing of suits against the officers of the government. And the Tribunal of Conflicts,<sup>3</sup> when called upon to decide what was the effect of the repeal of article 75, held that the competence of the courts was not enlarged by its repeal in such a way as to give them the power to decide upon the legality of an

<sup>1</sup> Cf. Dareste, *La Justice Administrative en France*, 520; Aucoc, *op. cit.*, I., 676.

<sup>2</sup> Decree of Sept. 19, 1870.

<sup>3</sup> As to the nature of this body, see *infra*, II., p. 258.

act of an administrative officer, since such a construction would practically destroy the independence of the administration.<sup>1</sup> That is the ordinary courts are not yet competent to determine the jurisdiction of an administrative officer. They may, however, mulct an officer in damages where he has done an act of a purely personal character clearly out of his jurisdiction, by which an individual has suffered. Of course the courts have in the first instance to pass upon the question of jurisdiction, but if they make any attempt to encroach upon the sphere of the administration, the conflict, as it is called, is raised and the case is removed into the Tribunal of Conflicts, which thus has the power of preventing the ordinary courts from making such use of their power to hold an officer responsible in damages for his purely personal acts, as to decide the question of the legality of administrative acts.<sup>2</sup> The exact powers of the French courts may probably be best explained by a citation of several cases. It has been held that, when an officer has clearly gone out of his way and has slandered another person, even though the slander was committed by the officer while in the discharge of his functions; or when he has been negligent in the discharge of his duties; or when he has been guilty of a clear abuse of power, he may be held responsible by the ordinary courts in damages. In accordance with these principles a commissary of police was declared liable for slander who had in open court addressed a former magistrate and said that the court was extremely fortunate in being rid of such a magistrate; an engineer who made mistakes in his calculations with the result that the con-

<sup>1</sup> *Arrêt* 26 juillet, 1873, *affaire Peltier*.

<sup>2</sup> *Infra*, II., p. 259.

struction which he was erecting fell down and injured several persons, was held responsible for the damages which his negligence caused ; an officer who, to protect a building of the state from the nuisance of stray dogs, deliberately enticed a dog to come near it and killed it by giving it poisoned meat was held responsible for the damage he caused. On the other hand a prefect who shut up a factory while acting in accordance with instructions issued by one of the ministers in order to execute a law, could not be held responsible before the ordinary courts even though his act was not legal. The difference between these cases will at once be seen, though it is impossible to state it with the exactness of a mathematical formula.<sup>1</sup>

It will be noticed that the French rule as to the responsibility of officials before the courts for damages caused by their illegal acts is at the same time narrower and broader than the English and American rule. It is narrower in that the ordinary courts are not allowed to decide finally the question of the jurisdiction of the administration which is so important with us ; it is broader in that any purely personal act of the officer may be a ground for damages whether it was done in the performance of a discretionary duty or a ministerial duty.

A word must be said as to the position of the ministers. It seems to be the opinion of the best writers that they occupy a more protected position than do other officers. The same rule applies to them as to other officers so far as regards the acts which cannot be considered as purely personal in character. The courts may not delimit the sphere of their competence or determine their

<sup>1</sup> Laferrière, *La Juridiction Administrative*, I., 595, *et seq.*

jurisdiction. But, further, the principle of parliamentary responsibility is believed to cover in great measure their purely personal acts, for which they may be held responsible by the courts, only with the consent of the house of the legislature to which has been given by the constitution the right of impeachment.<sup>1</sup>

b. *Modifications of the Roman rule in Germany.*—After the breaking up of the empire in 1806 the only judicial control that could in the nature of things be exercised over the officers of the government was to be exercised by the courts of the different states, which came into being as a result of the dissolution of the empire. These courts were held by judges who, owing to the permanent tenure of all the officers of the government, had a practical independence of the administration. The old German rule as to the responsibility of the officers of the administration to the courts<sup>2</sup> was felt to be inconsistent with the needs of an administration able to cope with the problems presented in this century. It was feared that the administration would be unable to perform its work. Therefore the old Roman principle was reintroduced into Germany, or at any rate into Prussia, which may be taken as a type, and it was provided that no individual might sue an officer of the administration before the consent of an administrative body called a competence court had been given.<sup>3</sup> As in France the responsibility of officers for damages was not in theory destroyed but the bring-

<sup>1</sup> Laferrière, *La Jurisdiction Administrative*, I., 610.

<sup>2</sup> This was, it will be remembered, that they were responsible for damages resulting from every violation of their duties and for negligence in their discharge as well as for the positive overstepping of their jurisdiction. (Gneist, *Das Englische Verwaltungsrecht*, 1884, I., 379, note.) This rule resulted in a wider responsibility than that asserted by the English rule, which relieved officers from responsibility for negligence in the performance of a discretionary act within their jurisdiction.

<sup>3</sup> Prussian Law, Feb. 13, 1854.

ing of a suit was simply made more difficult. But, as in France, the way in which the law was applied did not give satisfaction; and when the present empire was founded the attempt was made to do away with the evils which experience had shown were connected with the adoption of such a method of protecting the independence of the administration. The law of Jan. 27, 1877, which organized the imperial judicial system, provided that the body whose consent was necessary before the suit could be brought, should be judicial in character, *i. e.*, either the highest administrative court, if there were one in the particular member of the empire, or if there were none, then the imperial court at Leipsic. In other words the preliminary question of the jurisdiction of the officer is to be decided by a body judicial in character and completely independent of the administration. The result of this development is that the responsibility of German officials to individuals for the damages they may have committed either through a violation of the law or through their negligent action is broader than in any other of the countries whose law is being considered. The old German principle has, notwithstanding the temporary adoption of the principles of the Roman law, retained a greater influence in the land of its birth than in any of the other countries; and this method of judicial control over the administration is really the most important means by which the ordinary courts may force administrative officers to obey the law and act efficiently and justly.<sup>1</sup> It is, however, to be noticed that on account of the separate decision of the preliminary question of jurisdiction the exercise of this control of the civil courts is more difficult than in either England or the United States.

<sup>1</sup> Cf. Bornhak, *Preussisches Verwaltungsrecht*, II., 42, *et seq.*



## CHAPTER III.

### CONTROL OF THE CRIMINAL COURTS.

#### *I.—Power of the police courts.*

The control which the criminal courts may exercise over the administration is exercised in two ways. In the first place these courts may be allowed, and in most systems of administration are allowed, to decide actions brought by the administration against individuals, either for violation of those rules of administrative law which have been put into the form of simple absolute unconditional commands, including the ordinances of the administrative authorities, and whose violation has been by law made punishable criminally, or for unlawful resistance to officers discharging their duties. In all such cases the criminal courts have the right to refuse to punish the person prosecuted, on the ground that the administration has exceeded its powers and has acted without jurisdiction. They thus delimit the sphere of administrative action and competence and force the administration to keep within the bounds set by law. The law of all countries is in theory the same in this respect. But in England and the United States the power of the criminal courts is rather greater than on the continent, on account of the fact that so many of the rules of the administrative law of those countries

have been put into the form of simple absolute unconditional commands.

*II.—Power of the criminal courts to punish officials.*

*Method of prosecution.*

The second way in which the control of the criminal courts is exercised over the administration is by deciding criminal prosecutions brought not against individuals but against officials to punish them for the criminal violation of their duties. The extent and efficacy of this method of control depend, in the first place, on the content of the criminal law, *i. e.* on the extent to which the violation of official duty is punishable criminally, and, in the second place, on the method of prosecution.<sup>1</sup> For while the content of the criminal law may be such as to provide for a large control over the administration, if the method of prosecution give the administration a large discretion as to when the control shall be exercised,—if the courts or individuals have little power of initiating and carrying on a prosecution against an officer—the control of the criminal courts may amount virtually to nothing.

There are two methods of conducting prosecutions, the one through a private prosecutor, the other through a public prosecutor. So far as the control of the criminal courts aims at the protection of private rights the system of private prosecution will undoubtedly produce the best results; so far as that control aims at the efficiency of the administration, as it must to a certain extent in all countries and as it does particularly in the United States, the system of public prosecution is capable of greater efficiency, since it is certain that

<sup>1</sup> For the content of the criminal law see *supra*, II., p. 79.

private prosecutors usually initiate prosecutions only in those cases where their private rights have been violated.

1. *Private prosecutor.*—As the English system of criminal procedure was formed with the special purpose of offering protection to private rights, it is only natural that we should find that it has always made provision for a private prosecutor and, indeed, has mainly relied on this method of prosecution. Even the law which within quite recent years has made provision for public prosecutors<sup>1</sup> still permits the private prosecutor also to act. It guarantees no monopoly of the power of prosecution to the administration. In order, however, to ensure the bringing of prosecutions the English law has always regarded the power of prosecution, which was guaranteed by the system to individuals, as a duty which the courts could enforce by binding over the individual complainant to prosecute. The action of the public prosecutor in England is simply subsidiary and is generally made use of for those cases where the incentive to private prosecution is not strong. The usual method of prosecution is complaint of the individual to a committing magistrate who makes a preliminary examination of the prisoner and sends the case up to the grand jury. This body then proceeds by indictment. It is not, however, confined in its action to such cases, but may proceed of its own motion in regard to matters of which it has personal knowledge. Sometimes also it is proper for individuals to make their complaint direct to the grand jury, but in some instances in the United States this has been held to be improper.<sup>2</sup> Public prosecutors are permitted to

<sup>1</sup> The Director of Prosecutions Act of 1879, 42 and 43 Vict., c. 22.

<sup>2</sup> Thus *cf.* *McCullough v. Commonwealth*, 67 Pa. St. 30.

proceed of their own motion by means of criminal information. This power is, however, made use of against officers only in case they have acted from corrupt motives, or have been guilty of manifest acts of oppression and wilful abuse of power. This power is usually exercised by the officers of the Crown such as the attorney general or the solicitor general, and not so much by the directors of public prosecutions, whose main duty is to conduct the prosecutions after they have once been initiated.<sup>1</sup> The further power is given to the public prosecutors to quash a prosecution by entering a *nolle prosequi*. This power does not, however, put the control of prosecutions into the hands of public prosecutors. For they act under the control of Parliament and public opinion; and the entering of a *nolle prosequi* is no bar to another indictment.<sup>2</sup>

2. *The United States district attorney.*—The basis of the American system of prosecution is the same. It has, however, received important modifications owing to the very general introduction of public prosecutors, *i. e.* the district attorneys or similar officers, who are to be found in nearly all the commonwealths as well as in the national administration. As the establishment of this office was due very largely to the desire to prevent inconsiderate prosecutions, great discretion is given by the decisions of the courts to the district attorneys in the initiation of prosecutions, although a monopoly of such power is not given to them. That is, the individual is still permitted to make his complaint before a committing magistrate, when the grand

<sup>1</sup> See Gneist, *Das Englische Verwaltungsrecht*, 1884, 383.

<sup>2</sup> Cf. *U. S. v. Shoemaker*, 2 McLean, 114.

jury will act in very much the same way as in the old English method. Some of the cases, however, would seem to indicate that the individual has no longer the right to go before the grand jury and make his complaint directly to them.<sup>1</sup> This power has been replaced by the power given to the public prosecutor to present cases himself to the grand jury. As in all cases the management of the case before the grand jury is largely in the hands of the public prosecutor, the result is that for the punishment of almost all crimes which the officers of the administration may commit, the action of the public prosecutor has become a practical necessity.<sup>2</sup> This is particularly true because of the fact that the conduct of the prosecution, after it has once been initiated, is largely, indeed almost entirely, in the hands of the public prosecutor. Some of the cases on this point go so far as to intimate that the participation of other counsel than the public prosecutor in a prosecution for crime is absolutely forbidden<sup>3</sup>; while others declare that though other counsel, *i. e.* counsel representing some private individual interested, may be admitted, their admission is a privilege which may be granted or refused by the district attorney and not a right which the individual may demand by application to the courts.<sup>4</sup> All these cases are decided as a result of the application of the principle that the prisoner is to be protected from malicious prosecution

<sup>1</sup> *McCullough v. Commonwealth*, 67 Pa. St., 30; *Fout v. State*, 3 Haywood, Tenn., 98; *Commonwealth v. Simons*, 7 Philadelphia, 167.

<sup>2</sup> *Ibid.*; *Peacock v. State*, 42 Ind., 393; *Hite v. State*, 9 Yerger, Tenn., 198; see also Wharton, *Criminal Pleading and Practice*, sec. 354.

<sup>3</sup> See *People v. Hurst*, 41 Mich., 328.

<sup>4</sup> *Commonwealth v. Williams*, 9 Cushing, Mass., 582; *Commonwealth v. Knapp*, 10 Pickering, Mass., 477; *Commonwealth v. King*, 8 Gray, Mass., 501.

on the part of the individual, and that, therefore, the public prosecutor has a monopoly either of initiating or of conducting the prosecution.<sup>1</sup> There seems to be no case which directly answers the question whether the courts, in case a district attorney refused without reason to bring a prosecution against an officer of the government, might appoint an attorney to conduct such prosecution. This has, however, been provided in some cases by statute.<sup>2</sup> Thus a statute in Pennsylvania provides that if the district attorney shall neglect or refuse to prosecute in due form of law any criminal charge regularly returned to him or to the court of the proper county or if, in case of the admission of the counsel of a private prosecutor, the district attorney shall differ with him as to the conduct of the proceedings, the court on the petition of the private prosecutor may direct the private counsel of the prosecutor to conduct the entire proceeding. Further it is to be noticed that, as a rule, the public prosecutors have the right to quash a prosecution by the entering of a *nolle prosequi*. Some of the cases hold that the action of the public prosecutor in so doing is subject to the control or consent of the court,<sup>3</sup> but most of the cases insist upon the necessity of this consent only after a jury has been empanelled, their reason being to protect private rights, *i. e.* the rights of the prisoner. For as had been said, a *nolle prosequi* is no bar to another indictment. They seldom seem to require the consent of the court in order to

<sup>1</sup> See also *Gonzales v. State*, 26 Texas, 197, which seems to recognize in the courts a power for "special reasons," which are not indicated, to appoint counsel for the prosecution of suits; *cf.* *Wharton, op. cit.*, sec. 555.

<sup>2</sup> See Pa. L., March 12, 1868.

<sup>3</sup> *State v. Moody*, 69 N. C., 529; *Statham v. State*, 41 Ga., 507.

prevent the public prosecutor from rendering an indictment or other prosecution nugatory.<sup>1</sup> In some cases, however, the power of the public prosecutors to enter a *nolle prosequi* has been taken away altogether by statute, and the indictment may be quashed only as a result of the action of the court on a motion to dismiss made by the public prosecutor.<sup>2</sup>

This method of prosecution tends of course to relax very greatly the control over the administration exercised by the criminal courts. For the public prosecutor, in whose hands is practically the power both to initiate and conduct prosecutions against officers of the administration, is, whatever be the method of organizing the system, in more or less close affiliation with the administration and is liable to over-estimate the importance of administrative independence even to the detriment of private rights and in some cases of administrative efficiency. We have had in our administrative history too many instances of the refusal on the part of the district attorney to proceed with the prosecution of public officers, or of such negligence on his part in conducting a prosecution which he has been forced by public opinion to initiate, that officers guilty of official and other crimes have been able to escape responsibility for their actions, altogether. The "pigeon-holing" of indictments has become altogether too common in the case of officers or of persons in close relation with the administration. The danger is undoubtedly greater

<sup>1</sup> See *U. S. v. Shoemaker*, 2 McLean, 114; *U. S. v. Stowell*, 2 Curtis C. C., 153; *State v. I. S. S., I. Tyler*, Vt., 178; *Commonwealth v. Tuck*, 20 Pickering, Mass., 356; *Commonwealth v. Briggs*, 7 Pickering, 716, 179; *Ex parte Donaldson*, 44 Mo., 149; *State v. McKee*, 1 Bailey, 651; *State v. Kreps*, 8 Alabama, 951.

<sup>2</sup> See *c. g.* N. Y. Code of Criminal Procedure, secs. 668-671.

when the public prosecutor is dependent in his tenure of office and in his action upon the administration than it is where he is elected by the people; but even in this latter case his party affiliations are so strong as often to preclude the probability of an energetic prosecution of official criminals. One way of organizing the prosecuting force, which would remedy these defects, would be to have the public prosecutor appointed and dismissed by the courts, or at least to provide, as has been done in Pennsylvania, that, in case of the neglect of the public prosecutor, the courts may appoint attorneys to conduct the prosecution.

In the system of public prosecution adopted in the national administration all public prosecutors are appointed by the President with the consent of the Senate and dismissed by the President alone. As the President is, as has been shown,<sup>1</sup> the head of the national administration, the administration has it in its power practically to prevent the efficient conduct of any prosecution against any officer of the administration. It may further prevent the filing of any information against officers of the administration, though it cannot prevent the finding of an indictment. For the Revised Statutes provide that a circuit or district judge may in his discretion order a *venire facias* to issue, by which a grand jury will be summoned. This body may then find an indictment,<sup>2</sup> which it will be the duty of the district attorney to prosecute.<sup>3</sup> But as the district attorney commonly has charge of the proceedings before the grand jury, will conduct the case after it has been initiated, and has the power to enter

<sup>1</sup> *Supra*, I., p. 69.

<sup>2</sup> U. S. R. S., sec. 810.

<sup>3</sup> *Ibid.*, sec. 771.



a *nolle prosequi* practically in his discretion<sup>1</sup> his negligence or unwillingness to act, or that of the administration which he represents and upon which he is dependent, may often render very difficult, if not absolutely impossible, a conviction of an official of the national administration for a criminal violation of his duty. Finally it is said that the President may order the entering of a *nolle prosequi* at any stage of criminal proceedings.<sup>2</sup> In the commonwealths, however, the public prosecutors are usually elected by the people of the counties and the danger is not so great, though even here it is a real one on account of the party affiliations of the public prosecutors which must necessarily have a great influence on their action.

3. *Public prosecutor.*—While England is the home of private prosecution, which also lies at the basis of the system in the United States, France is the originator of the modern institution of public prosecution. Originally founded in France with the purpose of merely supplementing the activity of the private prosecutor, which the old Teutonic law provided, the office of public prosecutor has in France completely replaced the private prosecutor, who no longer exists. The code of criminal procedure provides<sup>3</sup> that the public prosecutor alone has the right to initiate criminal proceedings. During the period of the absolute monarchy the public prosecutors were appointed by the King, who thus had in his hands the control of all prosecutions against officers of the administration. After the revolution, during the short period of decentralization, the least important of these public prose-

<sup>1</sup> U. S. v. Stowell, 2 Curtis, C. C., 153.

<sup>2</sup> 5 Opinions Att'y Gen'l, 729.

<sup>3</sup> Art. 1.

cutors were elected by the people. But in 1800<sup>1</sup> the election of public prosecutors was done away with, and appointment became the rule. Now all public prosecutors, with the exception of the mayor, who, it will be remembered, may be removed by the President of the republic, and who is the public prosecutor in the most unimportant districts for police offences, are appointed and removed by the President of the republic. They all act under the direction and control of the minister of justice. They are also to a small extent under the control of the courts to which they are attached. The courts may thus send orders to them, supervise their acts, and see that these are regular. The actual disciplinary power which the courts have over them would, however, seem to be quite small. Indeed the only cases in which the law says that the public prosecutors must act, seem to be where the complaining parties initiate civil proceedings against officers at the same time that they endeavor to get the public prosecutors to initiate criminal proceedings, as may be done under the French law. In such cases the judges must send on the criminal complaint to the public prosecutors who, it is said, are bound to act.<sup>2</sup> The effect of such a method of prosecution upon the control of the criminal courts over the administration is to put almost completely into the hands of the central administration the decision as to when it shall be exercised. The control of the criminal courts in France over the administration amounts therefore to very little; in time of political excitement it would be impossible to make use of it at all.

<sup>1</sup> Constitution of 22 frimaire, an VIII, art. 53.

<sup>2</sup> Block, *Dictionnaire de la Politique*, II., 317, *sub verbo* *Ministère public*.

The old German method of criminal prosecution gave to the criminal courts an almost complete control over all criminal proceedings. The procedure before the courts was an inquisitorial procedure as a rule,—a procedure in accordance with which the courts were the prosecutors and were set in motion by the complaint of any individual who had been injured by the commission of a crime. The criminal courts, thus having the whole matter of criminal prosecutions in their hands, and being in their tenure practically independent of the administration, offered to the individual as complete a remedy against the illegal and criminal action of the administration as could well be desired or devised. The position of the criminal courts was so strong that they could, and indeed more than once did defy the prohibitions of the executive to hear criminal complaints against officers of the administration.<sup>1</sup> In Prussia, however, during this century French institutions were copied in this respect as in so many others. Soon after the revolution of 1848 a royal ordinance<sup>2</sup> took away from the courts all power of criminal prosecution and gave it to the public prosecutors who were then provided and who were placed completely under the control of the ministry. This ordinance thus destroyed all responsibility of the officers of the administration before the courts for criminal actions, and permitted the ministry to violate with impunity the rights of individuals by allowing officials to go scot free who had under its direction violated the law. This condition of things was aggravated by the law of Feb. 23, 1854, which did so much to weaken the civil responsibility of officials.<sup>3</sup> This law provided

<sup>1</sup> Gneist, *Das Englische Verwaltungsrecht*, 1884, 383, note.

<sup>2</sup> Of date Jan. 2, 1849.

<sup>3</sup> *Supra*, II., p. 176.

that before even the public prosecutor could initiate criminal proceedings against officers of the administration, the competence court at Berlin, which was practically under the control of the ministry, should first decide that there was a proper case for criminal prosecution, a "*zur Strafverfolgung geeigneter Fall*." The abuse which was made of this power was so marked—it resulted in destroying all control possessed by the criminal courts over the administration—that after the empire was established it was provided : First, that the preliminary decision necessary before an officer of the administration can be prosecuted criminally<sup>1</sup> shall be confined to the question whether such officer has violated his duties, and shall be rendered by a really independent body of a judicial character, *i. e.* either by the Imperial Court at Leipsic or by the highest administrative court, if there is any, whose members must be independent in tenure of the administration ; and second, that, while the public prosecutors are still in principle to retain their monopoly of criminal prosecution where this is provided by local statute, still in case they refuse to act, the courts may on the proposition of an interested party initiate the proceedings and appoint an attorney to conduct them.<sup>2</sup> The result is that while the formalities to be complied with before a suit may be brought against an officer of the administration, are in some districts rather formidable, the courts and not the administration have in their hands the initiation and the conduct of such proceedings.

<sup>1</sup> It is to be noted that many of the members of the empire do not require such a preliminary decision, though Prussia does.

<sup>2</sup> Code of Criminal Procedure, secs. 169-175 ; *Cf.* Gneist, *loc. cit.* This seems to be somewhat the same method which was adopted in Pennsylvania by L. March 12, 1868, *supra*, II., p. 183.

## CHAPTER IV.

### THE ADMINISTRATIVE JURISDICTION IN ENGLAND AND THE UNITED STATES.

#### *I.—Characteristics of the administrative jurisdiction in general.*

The direct judicial control over the administration which has so far been considered, has been found in the remedies offered to individuals against officers to obtain satisfaction for the commission of an illegal act. It has been seen how careful the law in most countries is to limit both the civil and the criminal responsibility of officials in order to protect them from vexatious suits. It often requires practically an absolute overstepping of their jurisdiction or corruption where they have acted within it, in order to found the responsibility, as in England and the United States, or where it has acknowledged such a responsibility in a wider form, as in France and Germany, it has been very careful to make sure that the courts will make moderate use of their power to determine the question of jurisdiction; in all cases makes it much more difficult to sue officers of the government than to sue ordinary private persons; and all but denies any responsibility of the government for the tortious acts of its officers. But even were this method of judicial control more easily exercised than it is, it would be found in many

cases to be ineffectual. A civil suit for damages against an official may be an altogether inadequate remedy, because damages will not in some cases be an adequate means of relief, and because, even if they were, the official sued may not be the possessor of enough property to satisfy a judgment. Again, the successful prosecution of a criminal suit against an officer may have value in tempering the future conduct of officials but does not result in any actual improvement of the condition of the individual whose rights have been violated. In both cases a right may have been violated and adequate satisfaction has not been made. Therefore, were the remedies which have been mentioned the only means which the courts had to control the actions of the administration in the interest of private rights, the judicial control over the administration would be quite incomplete. Some means must be provided by which the courts may directly control the acts of the administration. It may be of vital importance to the individual or to the public that a thing be done which the law says shall be done. It is not just to tell an individual that he must wait until his right has been violated and then sue the proper official for damages, or even prosecute him criminally. The individual desires a definite thing done by the administration which the law says shall be done. Again it may be of vital importance that an officer be prevented from doing an act which he threatens to do, or that a decision which is regarded as unfair or illegal be reviewed and annulled or amended. Here, for the same reason as before, it is not right to force the individual to rely on his power to sue the officer in damages or prosecute him criminally.

In all these cases, if individual rights are to be adequately protected against the administration, some method of judicial control must be devised in addition to those already mentioned. Some means must be offered of reaching the acts and not the persons of the officers of the administration. The various remedies which the law offers against the acts of the administration form what may be called the administrative jurisdiction. For through the application of these remedies the courts take cognizance and jurisdiction of administrative acts. Such a jurisdiction may be formed in two ways. It may be granted to the ordinary courts, or special courts may be formed for its exercise. The former method is that which has been adopted in England and the United States. The latter is that which has been adopted very generally on the continent of Europe.

## *II.—History of the English method.*

1. *History to the beginning of the eighteenth century.*  
—The English administrative jurisdiction, whose main principles have been adopted in the United States, is simply an outgrowth of the original system of administrative control. The Norman political system made no distinction between governmental authorities. All powers of government were consolidated in the hands of the Crown. First to be differentiated was the legislative authority, the Parliament. But for a long time after the differentiation of Parliament there was almost no legal distinction between the position of the officers for the administration of justice and that of the officers for the administration of government. Indeed most important officers discharged functions in both branches,

and all alike were regarded as merely the servants of the Crown. Some, it is true, were engaged mainly in the application of the private law, others were engaged mainly in the application of the public and administrative law. But all were officers of the Crown, which directly or indirectly could remove them all from office and could dictate to them what should be the decision of the cases which were brought before them.<sup>1</sup> To the officers of one of the courts, *viz.*, the court of king's bench, which was regarded as occupying a superior position because the Crown by a fiction of the law was supposed always to be present in it,<sup>2</sup> was given a supervisory power over all other authorities.<sup>3</sup> If any one was aggrieved by an act of a subordinate officer of the Crown he had the right to appeal to the Crown, who was the fountain of justice,<sup>4</sup> and such an appeal went to the court of king's bench. At first it seems to have gone to the *Curia Regis* or King's Council, before the development of the court of king's bench.<sup>5</sup> Indeed, after the development of the king's bench, when with the usual habits of judges the members of this court became very technical in their application of the law, appeals went in many cases directly to the Crown and were attended to generally by the chancellor or the council. For the King at the time of the formation of the court of king's bench specially reserved to himself

<sup>1</sup> Gneist, *English Constitutional History*, I., 391; High, *Extraordinary Legal Remedies*, 2d Ed., 5. As to the influence of the Crown over the decisions of the judges even, witness the famous case of John Hampden in the court of the Exchequer.

<sup>2</sup> See as to the origin of this fiction Stubbs' *Constitutional History*, I., 487, 601, II., 266; *cf.* Blackstone's *Commentaries*, III., 41.

<sup>3</sup> Gneist, *Const. Hist.*, I., 386, citing Bracton.

<sup>4</sup> See Stubbs' *op. cit.*, II., 254; Palgrave, *King's Council*, 61.

<sup>5</sup> 1 Ryleys' *Pleadings*, 534; *Abbreviatio Placitorum*, 21.

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the decision of particularly difficult cases.<sup>1</sup> From these reserved judicial powers grew up the court of chancery as well as other courts.<sup>2</sup> In answer to such appeals the court of king's bench issued in the name of the Crown certain writs directed to the officer whose decision was complained of, and so formed as to afford the desired relief. Though these writs were originally issued from the office of the chancellor,<sup>3</sup> the court soon obtained the right to issue them directly.<sup>4</sup> These writs were named from the most prominent words in them—words which largely expressed the purpose of the writ. Thus, if anyone appealed to the Crown to force a recalcitrant officer to do something which the law of the land commanded the officer to do, the writ which was issued in answer to the appeal was called the writ of *mandamus*.<sup>5</sup> But at the same time that the court of king's bench was developing these special remedies, which became known as extraordinary legal remedies or prerogative writs, the chancellor, the keeper of the King's conscience, was, through the exercise of the reserved judicial powers of the King, also developing a series of special remedies called equitable remedies, the most important of which, from the point of view of administrative law, was the bill of injunction. Originally, however, the injunction does not seem to have been made use of commonly against officers. While most of the writs issued by the royal courts were issued to

<sup>1</sup> Stubbs, *op. cit.*, I., 487.

<sup>2</sup> *Ibid.*, 601-603.

<sup>3</sup> Palgrave, *op. cit.*, 8.

<sup>4</sup> Gneist, *Const. Hist.*, I., 394; Palgrave, *op. cit.*, 16, 17; Reeves, *History of the English Law*, II., 394, 507, 605.

<sup>5</sup> The word "*mandamus*" was applied originally to all the commands of the King, but was later confined to the writ issued by the court of king's bench.—High, *Extraordinary Legal Remedies*, 5.

litigants upon proper demand *de cursu*, and were known as writs *ex debito justitiæ*, the writs by means of which the court of king's bench exercised its supervisory powers over the other authorities do not seem to have become, in early times at any rate, writs of right, writs *ex debito justitiæ*, but were issued only in extraordinary cases when some gross injustice was done. They were known, therefore, as "prerogative writs." The same was practically true of the equitable remedies, and particularly of the bill of injunction. Further on the return to these writs, generally only questions of law were considered. They were made use of simply to keep the lower authorities within the bounds of the law, and could not be used, after the practice in regard to them became crystallized, to review any question of fact or of expediency. It therefore became necessary to develop some further remedy, unless the lower authorities were to be permitted to decide such questions free from all control. Such a method was found in the power which was granted to the individual to appeal to the Privy Council. Such appeals the council might hear as a result of the fact that the King granted to a division of it, *viz.*, the star chamber a portion of his reserved judicial powers. This body acted as the administrative superior of the royal authorities in the localities, and on appeal to it questions of fact and expediency, as well as of law, could be considered.<sup>1</sup> Formed in the time of Henry VII to control the nobility, who had grown turbulent during the wars of the Roses, it served at first to protect the weaker classes of the community against the

<sup>1</sup> Blackstone, *op. cit.*, IV., 266 ; Palgrave, *op. cit.*, 57-61, 101-108 ; Stubbs, *op. cit.*, I., 603.

arbitrariness of the administrative authorities, which were largely chosen from the nobility<sup>1</sup>; but it was later, *viz.*, under the Stuarts, used in such a way that it was abolished on the occasion of the revolution in 1640.<sup>2</sup> In order to offer an appeal similar to the one which disappeared on the occasion of its abolition, it was provided in a series of statutes that the court of quarter sessions of the justices of the peace, which had been theretofore mainly an administrative authority for the purpose of county administration, could hear and decide appeals from those decisions of the justices of the peace, acting singly or in petty and special sessions, which affected property and the right of personal liberty.<sup>3</sup> There was thus formed for the decision of questions of fact and expediency, as well as of law, an administrative court in each county, which came finally to have a very wide power of control over the acts of subordinate administrative officers. Its members further would certainly have special knowledge of the law they had to apply and of the conditions of administrative action, since they were engaged in other capacities as administrative officers.

Further the commission of the justices of the peace enjoined upon them in difficult cases to take the advice of the royal courts. This came finally to be done by "stating a case" which was agreed upon by the justices and the parties before them, and which was then submitted to the royal courts, and finally decided by them.<sup>4</sup> In consequence of these facts, one of the writs which were originally issued by the court of king's bench,

<sup>1</sup> *Supra*, I., pp. 164, 196.

<sup>2</sup> 11 Car., I., c. 10.

<sup>3</sup> See Smith, *Practice at Quarter Sessions*, London, 1882, title, Appeals; Gneist, *Das Englische Verwaltungsrecht*, 1884, 397.

<sup>4</sup> Smith, *op. cit.*, 518.

*viz.*, the *certiorari*, lost much of its earlier importance in England; and we find that statute after statute was passed which prohibited its use as a means of appealing from the acts of administrative officers.<sup>1</sup>

But up to the coming to the throne of the Orange-Stuarts in 1689, all officers, whether judges or administrative officers, held their office at the will of the Crown. There was no judicial tenure as there was at the time in both France and Germany. In this fact, and in the existence in the Crown of reserved judicial powers, are probably to be found the reasons why the Crown permitted such a control over the administration to be given to the courts. For the Crown could exercise at any time a strong personal influence over the judges of the courts; and if it was found that the administration of the law was becoming so technical as to hamper the action of the administration, the Crown could at any time exercise its reserved powers and transfer any matter to a newly created and more pliable authority.<sup>2</sup>

In 1701, however, all this was changed. The act of settlement made the judges independent of the royal power, and the whole tendency of English development was to make the justices of the peace actually, though not legally independent of the Crown. An attempt by Lord Somers during the reign of William III to coerce, through the power of dismissal from office, numerous justices of the peace raised such a storm of opposition that no later ministry has dared to make use of such a power.<sup>3</sup>

<sup>1</sup> Gneist, *Das Englische Verwaltungsrecht*, 1884, 406.

<sup>2</sup> This was actually done in several instances, as has been shown. Cf. Palgrave, *op. cit.*, 57-61.

<sup>3</sup> *Supra*, I., p. 236.

At the same time that the tenure of the judges and the justices became independent of the Crown their administrative jurisdiction remained essentially the same, with the result that the control which might before have been regarded as merely a part of the administrative control became absolutely judicial in character, *i. e.* was exercised by authorities independent of the administration which was to be controlled.

2. *History in the United States.*—Such was the condition of the English administrative jurisdiction at the time the American colonies were founded. At first, indeed, the American judges, like the English judges of the same period, were both in tenure and action under the control of the executive which they were to control, but soon their tenure was assured both against the executive and the legislature, so that from a very early time the higher courts exercised a really judicial control over the actions of the administration. The justices of the peace did not, however, at first become independent of the administration in tenure. And this was probably the reason why our courts of quarter sessions were not able to develop any very large administrative jurisdiction. The appointment early in our history of other officers for purely administrative purposes relegated the justices to the position of inferior judicial officers who have a police jurisdiction and a minor civil private law jurisdiction. They were left very few administrative duties to perform. Notwithstanding the fact that the justices of the peace in the United States later on obtained a tenure independent of the administration, in that they became generally elected by the people for a fixed term of office, they never got anything like the same administrative juris-

diction that was given to their English brothers. It is true that in special instances we find appeals from the decisions of administrative officers allowed to the courts of the justices or their successors, the county courts. Especially is this true in some of the southern commonwealths and in Pennsylvania. But it may safely be said that there has never been, and is not now in the United States any at all important administrative jurisdiction except such as is to be found in the writs which the higher courts, as a result of their being the heirs of the English court of king's bench, have the right to issue. We have lost an important part of the English administrative jurisdiction—particularly important because by its means a host of questions of fact and of expediency could be reviewed on appeal. With us such questions are decided finally by the administration, with the result that a most precious means of protecting individual rights has been lost.

## CHAPTER V.

### THE ADMINISTRATIVE JURISDICTION OF THE HIGHER COURTS.

#### *I.—At common law.*

1. *The special remedies.*—The most important of the special remedies developed by the royal courts were five in number, each one corresponding to a particular need which experience had shown to exist. They were the *mandamus*, to force the administration to do what it had illegally refused to do; the prohibition or the injunction, to prevent the administration from proceeding to act where it ought not to act; the *certiorari*, to review a decision already made by the administration, to the end that such decision might be annulled or amended; the *habeas corpus ad subjiciendum*, to bring the matter of an arrest up before the courts, so that the person arrested might be set at liberty in case the administration had acted illegally; and the *quo warranto*, to prevent the usurpation of a royal franchise or privilege. This was later so shaped as to be made use of to decide the question, who was rightfully entitled to an office of trust and profit. Logically there was no need for the development of these last two remedies, as the same result might be reached through the use of

one of the other remedies.<sup>1</sup> But the questions of illegal arrest and imprisonment and the usurpation of franchise or office were believed to be so important that as a matter of fact special remedies were developed for these matters. What was originally a somewhat informal complaint on the part of the individual that injustice had been done, became finally, as in the case of all the writs issued by the royal courts, a demand for the issue of a special remedy or writ such as the courts had fallen into the habit of issuing. It was but a short step under such conditions for the courts to hold that the demand for a special remedy did not justify the court in issuing any other writ than the one demanded. While the appeal to the court might be made against any act of the administration and the administrative jurisdiction was not enumerated in the sense that a special statutory authorization was necessary in each case of its exercise, the remedies which could be asked for in particular cases were gradually enumerated in the decisions of the courts. A simple complaint of the denial of justice was finally insufficient.<sup>2</sup> The decisions of the courts have thus become quite technical in their character and hold that a writ which may be properly made use of for one purpose may not be made use of for another. Thus the

<sup>1</sup> Thus in New York the *habeas corpus* has as a result of the provisions of the Code of Civil Procedure been somewhat replaced by the *certiorari* to inquire into the cause of detention. Sec. 2015; *cf.* Church, *Habeas Corpus*, 330 *et seq.*

<sup>2</sup> Viner's *Abridgement*, 2d Ed., xv., 185, citing Barnwell's Chancery Rep., 377, anno 1740, where the plaintiff asked for a bill in chancery and was told to ask for a *mandamus*; also p. 200, citing *Queen v. Hungerford*, 11 Mod. Rep., 142, where *quo warranto* was asked for and the applicant was told he could have a *mandamus*. See also p. 206, citing 12 Mod. 196; and p. 208, citing 11 Mod., 254.



*mandamus* is not the proper writ to try the title to office.<sup>1</sup> Neither the *mandamus* nor the injunction is the proper remedy to review the decision of a subordinate administrative authority; this is to be done by the *certiorari*.<sup>2</sup> It has therefore become necessary for the applicant for the exercise of the administrative jurisdiction of the higher courts to make it certain, before he applies for the issue of any particular writ, that he is asking for the proper remedy. For if he does not he will be non-suited.

2. *Prerogative character of the writs.*—In the second place, owing to the fact that these writs were developed as a result of the exercise of the reserved judicial powers of the Crown they have never become writs *ex debito justitiæ*, that is the individual may not have them merely for the asking, as is the case with the writs beginning ordinary actions. The courts may refuse in their discretion to issue them.<sup>3</sup> From a very early time, however, on account of the importance of maintaining in its integrity the right of personal liberty, the *habeas corpus* has been regarded as a writ *ex debito justitiæ i. e.* to be issued on probable cause shown<sup>4</sup>; and the *Habeas Corpus* act,<sup>5</sup> provided that the judges should issue it under a penalty for refusal. With this exception the rule was that these writs were, as the law expressed it, prerogative in character. The tendency of the more modern decisions as well as of the statutes passed on this

<sup>1</sup> *People v. Corporation of New York*, 3 Johnson's Cases, 79.

<sup>2</sup> *Mowers v. Smedley et al.*, 6 Johnson's Chancery, 27; *People v. Police Commissioners*, 43 Howard's Pr., 385.

<sup>3</sup> See Viner, *op. cit. sub verbo Certiorari*, iv., p. 345, citing 8 Mod., 331; also *King v. Barker*, 1 Wm. Blackstone, 352.

<sup>4</sup> Church, *op. cit.*, 94 *et seq.*

<sup>5</sup> 31 Car. II., cap 2, X.; Church, *op. cit.*, 109.

subject has in both countries been to assimilate these writs more and more to ordinary actions which have no prerogative character at all. This tendency has been more marked in the United States than in England.<sup>1</sup> In some cases too the writs have been abolished altogether and ordinary actions substituted for them. This is true in New York of the *quo warranto*, and the information in the nature of a *quo warranto* which soon took its place. Here, however, the individual before the action can be brought must get the attorney general to move, who, it would seem, has the monopoly of the action; and it has been held that the courts may not force the attorney general to bring such action.<sup>2</sup> Even in England, where the writs are regarded as more prerogative in character than here, the modifications in the procedure adopted of late years have resulted in a practically greater freedom and ease in obtaining the writs. Indeed in some cases, as the result of statutory provision, they have become really little more than ordinary actions.

But notwithstanding the limitation of their prerogative character the courts, even of the United States, have large discretion in granting or refusing the application for the issue of most of the writs. In some cases the preliminary decision refusing the issue of the writ is not appealable even<sup>3</sup>; and in no case will they issue them where there is any other adequate remedy.<sup>4</sup>

<sup>1</sup> High, *Extraordinary Legal Remedies*, *passim*; cf. *Commonwealth v. Denison*, 24 Howard, U. S., 66.

<sup>2</sup> Code of Civil Procedure, secs. 1948, 1893; *People v. Fairchild*, 67 N. Y., 834.

<sup>3</sup> See *People v. Stillwell*, 19 N. Y., 531; *People v. Commissioners*, 82 N. Y., 506; *People v. Hill*, 53 N. Y., 547.

<sup>4</sup> *Rex v. Water Works*, 1 N. & P., 48; *People v. Board of Apportionment*, 64 N. Y., 627; *People v. Betts*, 55 N. Y., 660; High, *Injunctions*, 3d Ed., sec. 28.

What is an adequate remedy is to be decided by the courts. They have held that a suit for damages against an official is not an adequate remedy,<sup>1</sup> but have intimated, at any rate, that a suit for damages against a municipal corporation, where damages were in the nature of things a perfectly competent means of relief, is an adequate remedy.<sup>2</sup> They have also held that the remedy by indictment of an officer was not an adequate remedy.<sup>3</sup>

3. *The purpose of the writs.*—The purpose of the writs is twofold. In the first place, they are issued mainly with the intention of protecting private rights; in the second place, some of them may be made use of also for the purpose of the maintenance of the law regardless of the fact whether in the particular case a private right is attacked or not. Thus in the case of the *certiorari* it has been held that this writ may not be made use of simply for the maintenance of the law, that no one may apply for it unless he has some particular interest in its issue which is greater than that possessed by the ordinary citizen.<sup>4</sup> The courts have, however, held with regard to the *quo warranto* that it may be issued on the demand of a citizen of responsibility<sup>5</sup>; and the better rule would seem to be that in

<sup>1</sup> *People v. Green*, 58 N. Y., 295.

<sup>2</sup> *Buck v. City of Lockport*, 6 Lansing, 251.

<sup>3</sup> *Queen v. Eastern Counties R'y Co.*, 10 Ad. & El., 531; *King v. Severn & Wye R'y Co.*, 2 Barn. & Ald., 644; *People v. Mayor of N. Y.*, 10 Wendell, 395; *In re Trenton Water Power Co.*, Spencer, N. J., 659; *Fremont v. Crippen*, 10 Cal., 211; see also *Mechem, Law of Public Officers*, sec. 941, note 3.

<sup>4</sup> *People v. Leavitt*, 41 Mich., 470; *People v. Walter*, 68 N. Y., 403; *People v. Phillips*, 67 N. Y., 582; *State v. Lamberton*, 37 Minn., 362; *Granville v. County Commissioners*, 97 Mass., 193.

<sup>5</sup> *Commonwealth v. Neeser*, 44 Pa. St., 341; *State v. Kammer*, 42 N. J. L., 435; *Commonwealth v. Commissioners*, 1 S. & R., 380; *State v. Martin*, 46 Conn., 479.

matters of public concern any citizen or taxpayer may apply for the *mandamus*.<sup>1</sup> Further in the proper cases the officers of the administration may apply to the courts to force by these writs inferior officers to perform their duties.<sup>2</sup> Finally as a result of the *Habeas Corpus* act passed in the reign of Charles II any one may apply for the writ of *habeas corpus* whether he has any particular interest or not, that is, whether his own private rights are involved or not.<sup>3</sup> This rule has been very generally adopted into the law of the United States and is undoubtedly due to the necessity of affording as complete a protection as possible to the right of personal liberty, to the necessity of the maintenance of the law on this subject.

4. *Questions considered on the writs*.—As a general rule the courts may not on these writs consider or review the questions of fact or expediency which have been decided by the administrative authorities. This is one of the most important general principles affecting the use of the writs and lies at the basis of nearly all the cases.<sup>4</sup> The principle is applicable whatever be the rank or character of the officer who is to be controlled. Be he never so humble if he have discretion that discretion he is to exercise free from any control; be he never so influential he must act in accordance

<sup>1</sup> *People v. Collins*, 19 Wendell, 56; *People v. Halsey*, 37 N. Y., 344; see also *People v. Common Council of Buffalo*, 38 Hun N. Y., 637.

<sup>2</sup> *People v. Canal Board*, 55 N. Y., 390; *People v. Trustees*, 54 Barb. N. Y., 480; *Attorney General v. Boston*, 123 Mass., 460; *Wellington et al. Petitioners*, 16 Pickering, Mass., 87, 105.

<sup>3</sup> 31 Car. II., cap. 2, X.; Church, *op. cit.*, 93.

<sup>4</sup> *Rex v. Chichester*, 2 El. & El., 209; *King v. Justices*, 4 Dow. & Ry., 735; *United States v. Seaman*, 17 Howard, U. S., 225; *Gaines v. Thompson*, 7 Wallace, 347; *People v. Commissioners*, 30 N. Y., 72; *Burch v. Hardwicke*, 23 Grattan, Va., 51. An important exception is made in the case of the *habeas corpus*, see Church, *op. cit.*, c. xiii.

with the law. Thus the decision by a board of local highway commissioners as to the route to be taken by a highway may not be reviewed by the courts,<sup>1</sup> while the refusal of the United States secretary of the interior to issue a patent for lands after all questions of discretion had been decided in favor of the applicant has been held to be the violation of a ministerial duty and may be overcome by application to the court.<sup>2</sup> This rule is, however, subject to one or two exceptions. The questions of fact which have been decided by an administrative authority in deciding as to the title to office may be reviewed by the courts on either *mandamus* or *quo warranto*.<sup>3</sup> Further the courts will not permit administrative officers so to make use of their discretion as to make a decision which is absolutely unsupported by the evidence but will on *certiorari* quash such decision.<sup>4</sup> Again the courts hold that where a statute provides that an officer may be removed from office for cause only, they have the right to control the discretion of the removing officer in deciding what is cause.<sup>5</sup> The courts, it is true, do not ground their decisions on any desire to control the discretion of administrative officers, but on the proposition that the question, what is cause, is not a question of discretion but a question of law. But this does not alter the fact that, as a result of these

<sup>1</sup> *People v. Collins*, 19 Wendell, 56.

<sup>2</sup> *United States v. Schurz*, 102 U. S., 378. See also *People v. Beach*, 19 Hun, N. Y., 259.

<sup>3</sup> *State v. Garesche*, 65 Missouri, 480; *People v. Pease*, 27 N. Y., 45.

<sup>4</sup> *People v. Board of Police*, 39 N. Y., 506; *People ex rel. Hogan v. French*; *People ex rel. McAleer v. French*, 119 N. Y., 493, 502.

<sup>5</sup> *People v. Board of Police*, 72 N. Y., 415; *People v. Board of Fire Commissioners*, 73 N. Y., 437; *State v. St. Louis*, 90 Mo., 19; *Stockwell v. Township Board*, 22 Mich., 341; see also *Kennard v. Louisiana*, 92 U. S., 480.

decisions, the courts do exercise a control over the discretion of administrative officers—and that too upon a point where many think that it is necessary that the administration should possess full and unlimited discretion. Finally in several instances special statutes have been passed which expressly give to the courts a control over the discretion of the administration. Thus the present customs administrative act gives to the circuit courts of the United States the power on a sort of statutory *certiorari* to reverse or amend the decisions even of fact of the board of general appraisers as to classification of articles for duty under the tariff acts.<sup>1</sup> Thus also the legislature of New York has provided<sup>2</sup> that if the commissioners of excise in the larger cities refuse arbitrarily to issue a license for the retail sale of liquor to be drank on the premises, the party who has thus been refused a license may appeal to the courts for the issue of a *mandamus* to the commissioners to grant the license. Thus also the legislature of the same commonwealth has provided<sup>3</sup> that in case any person is aggrieved by the decision of the assessors as to the value of his property for the purposes of taxation, he may have a *certiorari* on which the courts may reverse or amend the decision of the assessors on the ground both of illegality and of unfairness or disproportionality.<sup>4</sup>

Finally for political reasons the courts have very generally laid down the rule that they will not exer-

<sup>1</sup> U. S. Laws of 1889-90, c. 407, sec. 15. Here it is probably a remedy *ex debito justitiæ*.

<sup>2</sup> L. 1886, c. 496.

<sup>3</sup> L. 1880, c. 269.

<sup>4</sup> See also New York Code of Civil Procedure, sec. 2140, which provides that the court in deciding on the writ of *certiorari* may consider the weight of the evidence.

cise their administrative jurisdiction where it brings them into actual conflict with the chief executive.<sup>1</sup> The rule is clear as to the President of the United States, but is not so clear as to the governors of the various commonwealths.<sup>2</sup> Most of the cases where the *mandamus* has been issued to the governor have been friendly suits where the governor has not objected to the jurisdiction; indeed one of them holds expressly that the court will issue the writ of *mandamus* to the governor if he does not object.<sup>3</sup> Where, however, the courts may issue the writs without coming into direct conflict with the executive they seem to have no objection to issuing them, even if they will be forced to annul the acts of the executive.<sup>4</sup> Thus they have issued a *habeas corpus* to consider the validity of an act of the governor in the extradition of a fugitive from justice, and have decided that such act was not in accordance with the law.<sup>5</sup> In the case of *Ex parte Merryman*, a case of *habeas corpus*, however, the writ absolutely failed of its purpose because the officer to whom it was issued was supported in his action by the President, and the court refused to take any further step on account of the danger of a conflict with the executive. Some of the commonwealths have endea-

<sup>1</sup> *State of Mississippi v. Johnson*, 4 Wall., 475; *Grier v. Taylor*, 4 McCord, 206; *People v. Hill*, 13 N. Y. Supplement, 186; *New York Law Journal*, April 13, 1891; affirmed on different grounds in 126 N. Y., 497; High, *Extraordinary Legal Remedies*, 2d Ed., sec. 118 and cases cited.

<sup>2</sup> As to the *mandamus* see *Cotton v. Ellis*, 7 Jones, N. C. 545; *State v. Chase*, 5 Ohio St., 528.

<sup>3</sup> *People v. Bissell*, 19 Ill., 229. As to the *quo warranto* see *Attorney General v. Barstow*, 4 Wis., 567.

<sup>4</sup> See *People v. Platt*, 50 Hun, 454.

<sup>5</sup> *People v. Curtis*, 50 N. Y., 321; *People v. Brady*, 56 N. Y., 182; see also *Ex parte Merryman*, Taney, 246, 9 *American Law Register*, 524; *Ex parte Field*, 5 Blatchford, 63.

vored to extend this exemption from the operation of the administrative jurisdiction of the courts to the heads of departments. But this is not the best rule either in the United States or England, and is in conflict with the decisions of the United States Supreme Court.<sup>1</sup>

5. *Distinction between legal and equitable remedies.*—Besides these general rules which are applicable to all the remedies by which the administrative jurisdiction of the courts is governed there are a number of special rules with regard to each one of the remedies. Thus there is quite a distinction between the extraordinary legal and the equitable remedies. While the former are almost always issued where the act of the administration is absolutely illegal in character, the latter may be issued only in those cases where the applicant for the remedy can bring his case under one of the recognized heads of equitable jurisdiction, such as that the act complained of is a breach of trust, will result in irreparable mischief to real property or will lead to a multiplicity of suits.<sup>2</sup> Further if we compare the injunction with the prohibition, whose purposes are largely the same, we find that the injunction appears to be, in the United States at any rate, the popular remedy. Although legally the courts have about the same discretion as to the issue of both of these remedies, as a matter of fact they seem to issue the injunction much more easily than the prohibition, and indeed in some of the commonwealths make use of the pre-

<sup>1</sup> See *U. S. v. Schurz*, 102 U. S., 378. There is also conflict on this point in the English decisions. See *Queen v. Lords*, etc., 4 Ad. & El., 286; *Same v. Same*, 4 Eng. Rep., 277; *Same v. Same*, L. R., 7 Q. B., 387; cf. Gneist, *Das Englische Verwaltungsrecht*, 1884, 712.

<sup>2</sup> *Green v. Mumford*, 5 R. I., 472, 475; *Dow v. Chicago*, 11 Wall., 108; *Hilliard, Injunctions*, 3d Ed., 486.

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liminary injunction with such freedom as in many cases to paralyze almost completely the action of the administration. This is unfortunately the case in New York. Here police officers have in several instances been by the injunction restrained from preventing palpable violations of the law.<sup>1</sup> In England, however, the injunction seems rarely to be made use of as a means of preventing administrative action. Gneist does not even mention it as one of the remedies in his description of the administrative jurisdiction of the English courts, but speaks of prohibition only<sup>2</sup>; and a search through the English digests reveals very few cases of the use of the injunction against administrative officers.<sup>3</sup>

6. *Administrative jurisdiction of the United States federal courts.*—In the case of the commonwealth courts the general rule is that the administrative jurisdiction is possessed by all those courts which have inherited the jurisdiction of the court of king's bench—and most courts of general common law jurisdiction have inherited such jurisdiction. This rule prevents courts with a mere appellate jurisdiction from exercising the administrative jurisdiction<sup>4</sup>; and results also in the fact that the equitable remedies may be issued only by courts possessing equity jurisdiction. The administrative jurisdiction of the United States federal courts is not however governed by these general prin-

<sup>1</sup> A good collection of these cases was made in an editorial of the *New York Times* of April 23, 1886.

<sup>2</sup> *Das Englische Verwaltungsrecht*, 1884, 404.

<sup>3</sup> That it is used now and then may be seen from the cases of *Ellis v. Earl Grey*, 1 Simon, 214; and *1 Vesey Sr.*, 188.

<sup>4</sup> *Morgan v. Register*, Hardin, 609; *State v. Biddle*, 36 Ind., 138; *State v. Ashley*, 1 Ark., 513; *Memphis v. Halsey*, 12 Heiskell, Tenn., 210; see also *Perry v. Shepherd*, 78 N. C., 83.

ciples, but is so fixed in detail by the constitution and the statutes that it becomes necessary to have reference to these and to the decisions made in interpretation of them in order to understand what exactly is the jurisdiction of these courts. It has been held in a series of decisions that the United States courts generally have no power to issue the *mandamus* or *certiorari* except to aid an already acquired jurisdiction: the Supreme Court, because the constitution does not include this power within the original jurisdiction given to that court<sup>1</sup>; the circuit courts and the district courts, because such power has not been granted to them by the judiciary act.<sup>2</sup> The supreme court of the District of Columbia may, however, as a result of the fact that it has inherited for the territory of the District of Columbia the jurisdiction of the court of king's bench, issue the *mandamus*,<sup>3</sup> and probably as a result of the application of the same principle the writ of *certiorari* also. It is to be noted, however, that the recent customs administrative act gives the power to the circuit courts to issue a sort of statutory *certiorari* to the boards of general appraisers in customs matters.<sup>4</sup> Where, however, it is necessary to issue such writs in order to enforce a jurisdiction already in other ways acquired, they may issue the *mandamus*, and as a result of the application of the same principle the *certiorari*.<sup>5</sup> In

<sup>1</sup> *Marbury v. Madison*, 1 Cranch, 137; *In re Kaine*, 14 Howard, 103; *Ex parte Vallandigham*, 1 Wallace, 243; *U. S. v. Young*, 94 U. S. 258, 259.

<sup>2</sup> *McIntire v. Wood*, 7 Cranch, 504; *U. S. v. Smallwood*, 1 Chicago Legal News, 321; *Ex parte Van Orden*, 3 Blatchford, 167; *Patterson v. U. S.*, 2 Wheaton, 221.

<sup>3</sup> *Kendall v. U. S.*, 12 Peters, 524.

<sup>4</sup> *Supra*, II., p. 207.

<sup>5</sup> *Lansing v. County Treasurer*, 1 Dillon, 522; see also *Rees v. City of Watertown*, 19 Wall. 107.

some of the cases laying down this rule a *mandamus* was issued by a circuit court to a municipal corporation to compel it to provide for the payment of a judgment obtained in the court against such corporation. Further as a result of the provisions of the United States constitution the Supreme Court, it would seem, has such power in cases where a commonwealth, or a foreign diplomatic or consular officer is a party.<sup>1</sup> The rules are about the same with regard to the prohibition. The Supreme Court has no right to issue a prohibition except in admiralty matters<sup>2</sup>; and it is very doubtful whether the circuit courts may issue a prohibition at all.<sup>3</sup> The rules are, however, more liberal with regard to the injunction, the *habeas corpus*, and the *quo warranto*. The power to issue the *habeas corpus* even to the administrative authorities of the commonwealths is given to all the United States courts, except the Supreme Court.<sup>4</sup> They have also the right to issue the *quo warranto* when the question at issue concerns the denial of the right to vote on account of race, color, or previous condition of servitude for any officer other than presidential elector and legislative officers, or concerns the disqualification for office resulting from the violation of official oath, by engaging in insurrection or rebellion against the United States or giving aid and comfort to its enemies.<sup>5</sup> The Supreme Court may not issue the injunction except to aid an already acquired jurisdiction and except in cases where a commonwealth, or a

<sup>1</sup> Const., Art. III., sec. 2, par. 3.

<sup>2</sup> U. S. Rev. Stats., sec. 688; U. S. v. Peters, 3 Dallas, 121; *Ex parte* Christy, 3 Howard, 292; *Ex parte* Insurance Co., 118 U. S., 61.

<sup>3</sup> U. S. Rev. Stats., sec. 716; *In re* Binninger, 7 Blatchford, 159.

<sup>4</sup> U. S. Rev. Stats., secs. 751-766; *Ex parte* Barry, 2 How. 65.

<sup>5</sup> Amendment 14, sec. 3; U. S. Rev. Stats., sec. 563, pars. 13 and 14.

foreign diplomatic or consular officer is a party.<sup>1</sup> The other United States courts have a large power, except in tax cases, to offer the equitable remedies in proper cases against the action of both national and commonwealth officers though they are pretty careful in their issue of the injunction.<sup>2</sup>

These rules apply as well to the issue of these remedies against commonwealth officers as to their issue against the officers of the United States government. If they have not an already acquired jurisdiction in the cases where this is necessary, they may not issue the writs. If they have they may.<sup>3</sup> On the other hand the courts of the commonwealths may never exercise their administrative jurisdiction in order to control the actions of the officers of the national government. For the United States courts have exclusive jurisdiction generally of all cases arising under the constitution and laws of the United States.<sup>4</sup> The result is that the officers of the national government are not nearly so subject to the administrative jurisdiction of the courts as are the commonwealth officers. But this control is not nearly so necessary as in the commonwealth administration. For the administrative control is so strong in the United States administrative system that the mistakes of subordinate administrative officers are quite easily corrected on appeal<sup>5</sup>; and if on such appeal the aggrieved individual is not able to ob-

<sup>1</sup> U. S. Const., Art. III., sec. 2, par. 3.

<sup>2</sup> U. S. Rev. Stats., sec. 629, par. 2.

<sup>3</sup> *Supra*, II., p. 211; *Graham v. Norton*, 15 Wallace, 247; *Commonwealth v. Dennison*, 24 Howard, 66.

<sup>4</sup> U. S. Const., Art. III., sec. 2, p. 1; *Brewer v. Kidd*, 23 Mich., 440; *Ableman v. Booth* and *U. S. v. Booth*, 21 How., 506; *Tarble's Case*, 13 Wall., 397.

<sup>5</sup> *Butterworth v. U. S.*, 112 U. S., 50, 57.

tain satisfaction he in all cases has the right of applying to the supreme court of the District of Columbia, which has the common law administrative jurisdiction for the territory of the District of Columbia, where all the heads of departments are to be found; and appeal may be taken from this court to the Supreme Court of the United States.

*II.—Special and statutory administrative jurisdiction of the lower courts.*

The special and technical character of the common law administrative jurisdiction of the courts has made it seem advisable in certain rather exceptional cases, where no one of the writs affords the proper relief, to provide by statute for special appeals, generally to the lower courts, from the decisions of administrative officers, when either questions of law alone or questions of both law and fact may be considered.

1. *Appellate jurisdiction of courts of quarter sessions or county courts.*—It has been shown that, after the abolition of the court of star chamber, which served as an appellate court on questions of both law and fact for the decisions of the subordinate English administrative officers, it was provided in a series of statutes that appeals should thereafter be taken to the court of quarter sessions of the county, which was composed of the justices of the peace of the county. This sort of administrative jurisdiction differs considerably from that of the royal courts, which has been considered. In the first place, the remedy is a general one—a simple appeal against the act complained of—while the jurisdiction is enumerated. In the royal courts it will be remembered that the converse is true, *i. e.* the remedies

are special in character and the jurisdiction is general. No one can appeal to the quarter sessions from an order or decision unless a statute specially permits an appeal to be taken in the class of cases of which the one at bar is one.<sup>1</sup> In the second place, the appeal may be and is usually taken on questions of fact. If questions of law are raised the proper courts to appeal to are the royal courts, to which appeal goes by special case or special writs.<sup>2</sup> In the third place, the general conditions under which the appeal may be taken are that the party appealing must be immediately aggrieved by the act complained of, not consequentially but immediately aggrieved. Thus the mapping out of a road is not an immediate grievance.<sup>3</sup> Officers of the localities may as private individuals appeal in the interest of their locality.<sup>4</sup> In the fourth place, while this sort of administrative jurisdiction is enumerated in the statutes still the statutes have been based on general principles in allowing these appeals. These are that the appeal is only granted where the rights of personal liberty and private property are involved.<sup>5</sup>

While in the United States the statutes granting a power of appealing from the decisions of the administrative officers to the courts of quarter sessions or county courts, which have largely taken their place, are not nearly so numerous, still we do find not a few instances of them. Thus in New York any one interested may appeal to the county court from the decision of the superintendent of the poor as to the settlement of a poor person.<sup>6</sup> An instance of a similar power of appeal, though in this case the appeal does not go to

<sup>1</sup> *Rex v. Hanson*, 4 B. & Ald., 521.      <sup>2</sup> *Rex v. Middlesex JJ.*, 1 Chitty Rep., 366.

<sup>3</sup> *Still v. Brennan*, 41 L. J. M. C., 85.      <sup>4</sup> *Rex v. Colbeck*, 11 Ad. & El., 161.

<sup>5</sup> *Gneist, Das Englische Verwaltungsrecht*, 1884, 397.      <sup>6</sup> L. 1872, c. 38.

the county court, is the power given to any individual, who has been refused a patent for an invention by the commissioner of patents, to appeal from this decision to the supreme court of the District of Columbia.<sup>1</sup>

2. *Special case*.—A most notable example of these attempts to supplement the administrative jurisdiction of the higher courts is to be found in the English habit of stating a special case. This habit, as has been indicated,<sup>2</sup> originated in a clause in the commission of the justices of the peace which enjoined upon them to ask the advice of the royal judges in cases where they were in doubt. These special cases are mostly statements of facts, are made up in both the quarter and the special sessions, and go up to the higher courts which decide the matter for the justices. At first the decision of the royal courts was only consultative in character, the justices not being bound by it, but the judicature act of 1873 has made the decision, it is believed, binding upon the justices and mandatory.<sup>3</sup> The courts have all alone encouraged the sending up of these special cases which have almost replaced the *certiorari*.<sup>4</sup> As a general rule the allowance of a special case is in the discretion of the justices.<sup>5</sup> On a special case the courts do not, as a rule, interfere with the discretion of the justices.<sup>6</sup> The special case, while not common in the United States, is not unknown to the American law.

<sup>1</sup> U. S. Rev. Stats., sec. 4911. This is in place of the administrative appeal to the head of department; *Butterworth v. U. S.*, 112 U. S., 50, 57.

<sup>2</sup> *Supra*, II., p. 196.

<sup>3</sup> *Wallsall v. Ry. Co.*, 48 L. J. M. C., 65.

<sup>4</sup> Gneist, *Das Englische Verwaltungsrecht*, 1884, 407; Smith, *Practice at Quarter Sessions*, 518-520.

<sup>5</sup> *Ex parte Jarvin*, 9 Dowl. P. C. 120. But see Smith, *op. cit.*, 521.

<sup>6</sup> *Rex v. Ry. Co.*, 43 L. J. M. C., 57; *Rex v. Kent*, JJ., 41 J. P., 263.

## CHAPTER VI.

### THE ADMINISTRATIVE JURISDICTION IN FRANCE.

#### *I.—History.*

In France, as has been said, the administrative jurisdiction has been given to special courts. France may be said to have founded the modern system of special administrative courts. Even before the revolution France possessed special administrative courts. Some of these were independent of the active administration, and had been established simply as a result of the application of the economic principle of the division of labor. Such *e. g.* were the court of moneyers and the chamber of accounts. But by the side of these tribunals there grew up in the 17th century new authorities completely dependent upon the active administration, and purposely made dependent upon it in order that the administration might have perfect freedom of action in its endeavor to perform the greater tasks imposed upon it as a result of the great increase of the powers of the Crown.<sup>1</sup> While in England as late as 1701 the ordinary courts were under the control of the Crown, and there was consequently no need, in order to make the administration independent in action, of forming special administrative courts, in France the

<sup>1</sup> *Ancoc, op. cit.*, I., 396, 397.



ordinary judicial bodies were quite independent of the Crown. The chief judicial bodies in France before 1789 were the parliaments, and their members were independent of the Crown as a result of the fact that the position of member of parliament was venal and bought and sold as property. The powers of these parliaments were never clearly defined, and in the general confusion of the time as to the distribution of the three great so-called powers of government, the parliaments often tried to assume a control over the actions of the administration. When Louis XVI came to the throne in 1774, it was seen that great reforms in the administration of the government and in the social conditions of the people must be undertaken. For this purpose the King chose Turgot as one of his ministers. The reforms which Turgot endeavored to introduce did not meet with the approval of the privileged classes. As the parliaments were composed of members of the privileged classes they opposed these reforms, refused to register the various edicts issued by the King,<sup>1</sup> encroached upon the royal power by themselves issuing decrees, and tried to hinder the action of the royal officers by issuing commands to them and citing them to appear before the parliaments to answer complaints made against them.<sup>2</sup> When the liberal elements obtained control of the Constituent Assembly, this action of the parliaments was remembered and the principle already enunciated by Montesquieu that the three so-called powers of government must be entrusted to different and independent authorities, was incorporated in the celebrated "declaration of the rights of

<sup>1</sup> Such *e. g.* was their action as to the edict abolishing the *corvée* or enforced labor of the peasants on public works.

<sup>2</sup> Aucoc, *op. cit.*, I., 17, 52.

man and of the citizen.”<sup>1</sup> The administrative authorities were made completely independent of the judiciary,<sup>2</sup> and judges were forbidden under pain of forfeiting their positions to interfere in any way whatever with the acts of the officers of the administration or to cite them before them for the performance of their duties.<sup>3</sup> For said the Constituent Assembly :

The constitution will be equally violated, if the judiciary may meddle with administrative matters and trouble administrative officers in the discharge of their duties. . . . Every act of the courts of justice which purports to oppose or arrest the action of the administration being unconstitutional, shall be void and of no effect. <sup>4</sup>

Thus the desire of the absolute monarchy to free the administration from all judicial control was realized by the revolution. This is the origin of the great principle of the independence of the administration which permeates all French law. Its adoption in modern times is due in great part to the fact that the ordinary judicial tribunals had hampered the administration in its work of reform in the 17th and 18th centuries, which they were able to do as a result of their position of independence over against the Crown.

In order, however, to offer the individual some remedy against the decisions of the subordinate officers of the administration, there was formed a most extended system of appeals from the subordinate to the higher administrative authorities. This it was easy to form in France on account of the formation after the revolution of a most centralized system of administra-

<sup>1</sup> Art. xvi.

<sup>2</sup> L., Dec. 22, 1789-Jan. 8, 1790, sec. iii., art. 7.

<sup>3</sup> L., Aug. 16-24, 1790, title ii., art. 15.

<sup>4</sup> Instructions to the law last cited, *Lois et Actes du Gouvernement*, I., 98.

tion.<sup>1</sup> Care was soon taken to give the power to decide the most important of these appeals to authorities not immediately connected with the active administration.<sup>2</sup> The active administration thus ceased to be at the same time party and judge. The plan was so successful, that the jurisdiction of the most important of these administrative tribunals, as they were called, has been gradually extended until this administrative jurisdiction is now really more extensive than that possessed by the ordinary judicial courts in the English and American system.

## *II.—Reasons for the retention of the system.*

1. *Need of special courts.*—While this method of judicial control over the administration was adopted largely as a result of peculiar local conditions, it has been retained for purely practical reasons. In the first place the special character of the matters which are embraced within the administrative jurisdiction requires, it is believed, for their satisfactory treatment special knowledge, which judges who devote most of their time to the consideration of questions of private law cannot be expected to possess. Different habits of thought and a practical knowledge of administrative law, to be obtained for the most part by direct contact with active administrative work, are regarded by the advocates of special administrative courts as essential. It is believed that these qualities are essential not only to the government but also to the individual. French experience has shown in those few

<sup>1</sup> See *c. g. L.*, Sept. 7-11, 1790, which provided for appeals in tax matters, and *L.*, Dec. 14, 1789, arts. 55 and 60, cited in Aucoc, I., 399, 400.

<sup>2</sup> *L. 28 pluviôse an VIII* (1800), art. 14.

instances where the decisions of the ordinary judicial courts and those of the administrative courts relative to private rights are capable of comparison, that the decisions of the administrative courts have been more favorable to private rights than those of the judicial courts. The tendency of the ordinary private law judge when confronted with an administrative question is to apply to it the rules of private law, which often lead him into errors and result in too great technicality.

2. *Need of an inexpensive and informal procedure.*—A further reason for the retention of the special administrative courts is the desirability of an inexpensive and informal procedure such as is not to be found in the ordinary procedure of the civil courts. In case of a conflict between the administration and the individual the contestants are not on a par as in an ordinary suit is usually the case; and it is desirable, as far as may be, to encourage individuals to bring suits against the officers of the administration in order to prevent an over-zealousness on the part of the administration to the detriment of private rights.<sup>1</sup>

### III.—*The general characteristics of the French system.*

1. *Administrative courts, courts of enumerated jurisdiction.*—The general rule is the same now that it was at the time of the Constituent Assembly, *viz.*, that the decision of all conflicts between the administration and individuals, and the interpretation of all administrative acts are reserved to the active administration. The ordinary courts are forbidden to interfere in any way with administrative action, even to interpret an

<sup>1</sup> Cf. Aucoc, I., 401-8.

administrative act of individual application which comes before them collaterally. This can be done only by the administration.<sup>1</sup> There are, however, exceptions to this rule. Thus the ordinary courts have as a result of special statutory provision the entire control of the matter of expropriation or the exercise of the right of eminent domain.<sup>2</sup> Again arrests made by the administration are under the control of the ordinary courts as a result of the penal code.<sup>3</sup>

On the other hand, as a result of the grant to the ordinary judicial courts of the application of the private and the criminal law, the general rule is that the courts have control of all contracts made by the administration and the entire police jurisdiction. This general rule is subject to several exceptions. Thus all contracts made by the central or local administration relative to public works and to public lands and all contracts of the central administration relative to the public domain and for material or supplies of personal property are put into the jurisdiction of the administrative courts. Further certain of the administrative courts have a certain amount of police jurisdiction, but not much.<sup>4</sup> But the usual rule is that the administration has the jurisdiction of all administrative acts and of administrative acts alone. In certain cases, however, which have been growing more and more numerous during this century, the statute law states specifically that the decision of complaints against certain classes of administrative acts shall be made not by the active administration, but by bodies called administrative courts, which are in large part unconnected with

<sup>1</sup> Aucoc, I., 424.<sup>2</sup> L., May 3, 1841.<sup>3</sup> Arts. 119 and 120.<sup>4</sup> Simonet, *Droit Public Administratif*, 157, and laws cited.

it. Each of these bodies has to decide in the particular cases provided in the statutes. The result is that the administrative courts are courts of enumerated jurisdiction. The particular grants of jurisdiction are, however, so numerous that, though in theory courts of enumerated jurisdiction, the important administrative courts are practically courts of general jurisdiction. This is true of the Council of State and the councils of the prefecture.

2. *Judges not independent of the administration.*—The judges of the administrative courts do not possess the same independent tenure that is possessed by the judges of the ordinary courts. They are all appointed and may at any time be removed by the President of the republic. This is undoubtedly a great theoretical objection to the French system,<sup>1</sup> but in practice their weakness of tenure over against the administration does not appear to have had any appreciable influence on their decisions. As has been shown, where it is possible to compare the decisions of these courts with those of the ordinary courts it is found that the decisions of the administrative courts have as a general thing shown more regard and consideration for private rights than those of the ordinary courts, whose judges have a fixed tenure of office. The reason why this precarious tenure has been retained in the French system, notwithstanding the advances that have been made in other directions during this century in the development of these administrative courts, is that it is believed necessary, in order that the administrative judges may have the necessary knowledge of administrative affairs, that they be continually engaged in

<sup>1</sup> Cf. Dicey, *The Law of the Constitution*, 3d Ed., 312.

active administrative work. Therefore the administrative courts are at the same time administrative councils, which are being continually called upon to advise the administration; and it is felt in a country like France, where the belief in the necessity of administrative centralization is so strong, that it would be unwise to relax the usual administrative control over the members of the administrative councils. This argument, however, seems to have really little weight. Of course the desirability of the possession by the administrative judges of special administrative knowledge cannot be gainsaid. The success of the English courts of quarter sessions is too great to permit the proposition to be questioned. But to attain this result it does not seem necessary that administrative judges shall be dependent upon the administration. The tenure of the English justices of the peace, though in theory not protected against the administration, is in reality protected, inasmuch as any ministry which should attempt to dismiss them from office for reasons other than absolute corruption would have to assume a most grave responsibility before Parliament.<sup>1</sup> Again, as will be shown later, the tenure of the judges of the administrative courts which have been lately formed in Prussia is made the same, as far as its independence is concerned, as that of the ordinary judges. It is possible in other ways to ensure that the administrative judges will have the necessary special knowledge of administrative affairs.

3. *Judges professional in character.*—The character of all the judges of the most important administrative courts is professional. That is, they all must have had a certain theoretical or practical administrative

<sup>1</sup> *Supra*, II., p. 197.

training, must be learned in the law; they receive a large salary also, and are not permitted to have any other occupation or profession. In most of the important administrative courts there is in addition to the judges a representative of the government. Such officer differs very much from an ordinary advocate. He is rather an *amicus curiæ* whose duty is to advise the court on difficult points, and to endeavor as far as possible to see that justice and right are done even to the detriment of the particular claim which the government may be making at the time.<sup>1</sup> This is not simply his theoretical position. Nothing is more common than to see such officer actually advocating the views which have been set forth by the individual who is protesting against some particular administrative act.

4. *Great freedom of appeal*.—In the administrative courts there is an almost unlimited power of appealing from the decisions of the lower courts to the higher court. On these appeals questions both of law and fact may be reviewed. There are very few of the courts which decide at the same time in first and last instance on questions of fact and none but the supreme court, the Council of State, which so decides on questions of law. This power of appeal is not limited by the amount in question. It is possible to go up to the Council of State in order to claim a reduction of a few *centimes* on a personal property tax for example. The French have felt this is necessary in order to check the too great zeal of subordinate officers. For when the contest is between the government and the individual the consequence of the commission of injustice cannot be measured by the amount at stake. The

<sup>1</sup> Aucoc, *op. cit.*, I., 415.



power of appeal has further been increased by the provision that in certain matters of especial importance costs are done away with altogether or are very largely reduced in amount, while the procedure has purposely been made very simple. It is to a large extent in writing, and is of a somewhat inquisitorial character. That is, the judges are not confined in their consideration of the case to what is laid before them, but may take such measures as they see fit to get at the truth. To a very large extent, the necessary action of a plaintiff in a suit in an administrative court consists simply in laying his complaint before the court which then attends to the rest.<sup>1</sup>

#### IV.—Nature of the remedies.

1. *The general jurisdiction of the administrative courts.*—The general jurisdiction of the administrative courts, the jurisdiction which all the courts possess over those matters which have been assigned to them by law, what the French call the *contentieux administratif*, has been worked out by the administrative courts themselves in their decisions, although the actual administrative matters over which they have this jurisdiction are designated in the statutes. This general jurisdiction consists in deciding complaints made by individuals against those non-political acts of the administrative authorities of special and not general application, whose immediate effect is to violate the rights of individuals acquired by virtue of some statute, ordinance, or a contract. Almost every word of this definition is essential.

In the first place it is to be noticed that the act must

<sup>1</sup> Cf. Aucoc, *op. cit.*, I., 411-423.

be non-political in character in order that the administrative courts may hear complaints against it. What is a political act it is difficult to say. The legislature has not defined it. In order therefore to determine what is such a political act we must have recourse to the decisions of the administrative courts themselves. These have held that acts are political in character which are performed by the President in carrying on the relations of the executive with the other governmental authorities and which relate to the carrying on of war, of diplomatic relations, and to domestic peace and tranquillity.<sup>1</sup> The only acts of this class which need special notice are those which relate to the domestic peace and tranquillity. The tendency of the decisions of the administrative courts has, it must be admitted, been to relieve the administration from all judicial control for acts which have been extremely arbitrary in character and very restrictive of private rights, where by such acts the administration was attempting to ensure domestic peace and tranquillity. The decisions have held that in time of public disturbance measures taken by the administration to prevent the publication of a journal which the administration alleged was inflaming the passions of the people, measures which resulted in the complete destruction of the plant of the journal, were of a political character and were not subject to the control of the administrative courts.<sup>2</sup> The tendency of these decisions is not regarded favorably by several of the French writers.<sup>3</sup>

In the second place in order to give the administra-

<sup>1</sup> Laferrière, *La Jurisdiction Administrative*, II., 32.

<sup>2</sup> *Con. d'État, Arrêts* of Feb. 26, 1857; May 9, 1867, cited in Ducrocq, *op. cit.*, sec. 64; cf. Aucoc, I., 441 *et seq.*

<sup>3</sup> Cf. Simonet, *Droit Public, etc.*, 155.

tive courts jurisdiction the act complained of must be of special and individual and not of general application, *i. e.* it cannot be an ordinance.<sup>1</sup> There is a special remedy against ordinances which will be alluded to later.

In the third place the act must have for its immediate, not its indirect and ultimate, effect, the violation of a right. Thus a prefect authorizes a commune to sell or close up a road which he and it regard as useless. A private individual may think that the particular road belonged to him; he cannot on that account, however, appeal to the administrative courts against the prefect's decision. For his right is not violated until the commune actually attempts to sell the road. Then and only then may he appeal.<sup>2</sup> This it will be noticed is similar to the English distinction, is the matter of appeals to the court of quarter sessions between immediate and consequential grievances. Further it must be noticed in this connection that the act must actually violate a right and must not be simply contrary to the interest of the individual complaining. This distinction between the violation of a right and the failure to consider an interest may be made plain by an example. The French law forbids any citizen to change his name without the authorization of the President. No person is considered as having a right to change his name, and in refusing to authorize a change of name the President violates no right. Therefore no one can appeal from the decision of the President, refusing the necessary authorization,

<sup>1</sup> Ducrocq, I., sec. 247.

<sup>2</sup> *Arrêt du Con. d'Etat*, Jan. 24, 1851; *Affaire Dénizet*, cited in Aucoc, I., 432.

to the administrative courts. But in case such a decision of the President does authorize a change of name, the right of a third person may be violated, since a family name is considered by the French law to be in the nature of a property right. Therefore an appeal is allowed to an interested third person from the decision of the President permitting an individual to assume the family name of the interested third party.<sup>1</sup> What is a right and what is an interest have been worked out in the decisions of the administrative courts. While this is the general rule exceptions have been made in particular cases by statute, but they are not important.

2. *Appeal to the Council of State for excess of powers.*—A second remedy is offered in the power granted to any individual to appeal to the Council of State against any act, not of a political character, of any administrative authority, on the ground that such authority has, in the performance of the act complained of, exceeded its powers or violated the law. This appeal is permitted even if the act complained of is of general application and even if it does not violate a right. This remedy, like the *contentieux administratif*, was worked out by the administrative courts, but has been given recently the sanction of statute, the law of May 24, 1872, providing<sup>2</sup> that the "Council of State decides finally on all demands to annul for excess of powers acts of administrative authorities." In what now does an excess of powers consist? When do we find a violation of the law? The decisions of the Council of State hold that there is an excess of powers: when an

<sup>1</sup> Ducrocq, *op. cit.*, I., 234, citing *Arrêt du Con. d'État*, Aug. 16, 1862.

<sup>2</sup> Art. 9.

administrative authority encroaches upon the competence of some other authority, whether that other authority be the legislative authority, a judicial authority, or another administrative authority<sup>1</sup>; when an administrative authority does not follow the formalities laid down in the law as necessary<sup>2</sup>; and when an administrative authority, even when acting within its competence and following the necessary formalities, uses its discretionary power for purposes other than those for which the power was granted.<sup>3</sup> The following case will give a good example of this last kind of excess of powers. It is almost as famous in the French law as the ship-money case of John Hampden is in the English law, or the case of the miller of *Sans-Souci* is in the law of Prussia. The French law gives to the prefect the right to regulate the movement of carriages about railway stations in the interest of public order, *i. e.* the police power. In order to obtain regular communications between the railway station at Fontainebleau and the city itself, the railway company entered into negotiations with an owner of carriages to meet all trains. This man demanded a monopoly. At the request of the company the prefect issued an ordinance which forbade all carriages but those of the contractor to enter the court of the railway station. The proprietor of a hotel in Fontainebleau, who had been in the habit of sending an omnibus to meet travellers at the station, sent an omnibus as before and was prosecuted for it. He appealed to the Council of State, on the ground that the prefect had made use of the police power to grant a monopoly, and the Council of State annulled the ordinance. This case is interesting for

<sup>1</sup> For example see Aucoc, *op. cit.*, I., 466.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*, 467.

several reasons. First it gives a good idea of what the French call a *détournement du pouvoir*, in the second place it shows that the remedy of appeal for excess of powers may be made use of against an act of general application, *i. e.* an ordinance. In the third place it illustrates the great regard which the administrative courts have for private rights—a regard which is greater than that of the ordinary judicial courts. For the ordinance of the prefect in question was a penal ordinance, and therefore, in accordance with the general principles of the French law, was to be enforced by prosecution before the police courts, from which appeal might be taken to the highest of the ordinary courts. Now before appealing to the Council of State the hotel proprietor in this case had been prosecuted and condemned to pay the penalty affixed to the ordinance, although the police courts had the right to refuse to enforce the ordinance on the ground that it was not legally made. On appeal to the Court of Cassation, the highest of the ordinary courts, this judgment had been affirmed, and it was only after exhausting the jurisdiction of the ordinary courts that the hotel proprietor decided to avail himself of his appeal to the Council of State which, as has been said, overturned the ordinance, notwithstanding that the highest judicial court had decided that it was legal.<sup>1</sup>

The interpretation of the words “acts of administrative authorities” contained in the law of 1872 is equally as broad as that given to the phrase “excess of powers.” These words are held by the decisions of the Council

<sup>1</sup> See *Arrêts du Con. d'État*, Feb. 25, 1864, *affaire Lesbats*, June 7, 1865, *Arrêts de la Cour de Cassation*, Dec. 6, 1862; Aug. 25, 1864, cited in *Bulletin de la Société de Législation Comparée*, 1872-3, 229; *cf.* Aucoc, *op. cit.*, I., 467.

of State to mean every act of every administrative authority, with the exception of political acts; and of late years the tendency of the decisions has been to take jurisdiction of many political acts in extreme cases.<sup>1</sup>

The remedy of appeal for excess of powers differs considerably in its character and its effects from the *contentieux administratif*. While as a result of the exercise of the *contentieux administratif* the administrative courts may review and amend the decision complained of, even if this involves the consideration of questions of fact and expediency, the Council of State may, when appeal is made to it on the ground of excess of powers, simply annul the act complained of and may not amend it or substitute another decision for the one appealed from, and will necessarily consider questions of law almost alone. The remedy is therefore much like the *certiorari* at common law. It also discharges somewhat the same function as the prohibition or injunction. For while the mere appeal to the Council of State is not suspensive, *i. e.* does not prevent the official whose act is complained of from going on and enforcing it, the Council of State may, if it sees fit, declare that the appeal in the particular case shall have suspensive effect, or may transmit the papers in the case to the proper minister and call his attention to the demand of the plaintiff that the appeal shall be suspensive. The minister may then order all administrative proceedings to be stopped.<sup>2</sup> This is practically equivalent to a temporary injunction. The other administrative courts do not seem to have power to declare that an appeal to them shall prevent the

<sup>1</sup> Ducrocq, *op. cit.*, I., sec. 252; Aucoc, *op. cit.*, I., sec. 300.

<sup>2</sup> Laferrière, *op. cit.*, I., 289, 290.

officer whose act is complained of from acting. But as in practically all cases, where an absolutely illegal act is complained of, the appeal against it goes to the Council of State on the ground of excess of powers, the power possessed by the Council of State is amply sufficient to protect individual rights. Finally it is to be noticed that France is the only country, whose laws are under consideration, which permits such a remedy to be made use of against the acts of the highest officers of state, including even the chief executive. The fact that the members of the Council of State are dependent in tenure upon the President of course will tend to prevent an immoderate use of their power.

*V.—The administrative courts.*

1. *General administrative courts.* *The councils of the prefecture.*—While the councils of the prefecture may be called general administrative courts, they are not courts of general jurisdiction. But the statutes conferring jurisdiction upon them are so numerous that they have a much wider jurisdiction than any of the other lower administrative courts, and, in point of fact, do have jurisdiction over almost all important conflicts that arise between the administration in its lower instances and the individual. These councils are composed of three or four councillors and the prefect, as president, who, in point of fact, seldom presides, and the secretary-general of the prefecture, who acts as the representative of the government. The councillors, who are the real judges, are appointed, and may be removed by the President of the republic. To be appointed as councillor the applicant must be twenty-



five years of age, and have either a theoretical or a practical knowledge of administrative matters. That is, he must be a licentiate in law, a degree which corresponds somewhat to an American degree of bachelor of laws, which admits to practice at the bar and is a university degree given by the faculty of law, or he must have served ten years in the judicial or administrative service, or for ten years have been a member of a general council of one of the departments. The functions of councillor of the prefecture are salaried, and are by law incompatible with the pursuit of any other occupation or profession.<sup>1</sup> The position is thus strictly a professional one.

The council of the prefecture is not only an administrative court, but is also an administrative council, and as such has to advise the prefect often in his administration and has in certain cases the absolute power of decision.<sup>2</sup> It is in this way that the French make it certain that the councillors of the prefecture shall be in daily contact with the workings of the active administration, and will therefore be able to decide with understanding the various matters which come up before them when they are organized as a court.

The jurisdiction of the council is of three kinds. In the first place it has the general administrative jurisdiction, *i. e.* the *contentieux* of a long series of matters. These are the direct taxes and taxes assimilated to the direct taxes; certain special questions of fact in connection with the indirect taxes, though indirect taxes as a whole, are for special reasons in the jurisdiction of the ordinary judicial courts; questions relative to the administrative control over the communes and the in-

<sup>1</sup> L. June 21, 1865.

<sup>2</sup> *Supra*, I., p. 274.

stitutions which the French call public establishments, *i. e. quasi* public corporations ; questions relative to communal elections and a series of miscellaneous matters which are not susceptible of classification, but which embrace a great many important administrative acts.<sup>1</sup>

In the second place the councils of the prefecture have a large original jurisdiction over the contracts and torts made and committed by the administration relative to the public works of both the central and local administration, to the public domain of the state, and the contracts for material and supplies of the central administration.<sup>2</sup>

In the third place the council of the prefecture has a large police jurisdiction of violations of police ordinances relative to the main roads, the draining of marshes and quarries.<sup>3</sup> This is an exception to the general rule which is that the entire police jurisdiction is given to the ordinary courts. The reason for the exception is to be found in the desire to give the administration great freedom of action. This purpose of the law has been incompletely attained. For the decisions of these councils and of the Council of State, particularly in regard to violations of the highway regulations, are here again more favorable to private rights than those of the ordinary courts, which have jurisdiction of the violations of the regulations relative to the lesser roads.<sup>4</sup>

Finally the councils of the prefecture act as boards of audit for the account of officers of *quasi* public corporations and of the less important communes.<sup>5</sup>

<sup>1</sup> Aucoc, *op. cit.*, I., 495 ; Laferrière, *op. cit.*, I., 317-321.

<sup>2</sup> Aucoc, *op. cit.*, I., 503-512.

<sup>3</sup> *Ibid.*, 515.

<sup>4</sup> Ducrocq, II., sec. 859.

<sup>5</sup> Aucoc, I., 517.

In most of these cases the councils of the prefecture decide finally but there is always an appeal from their decision not only of questions of law but also of questions of fact.

2. *Special administrative courts.*—The most important of the special administrative courts, *i. e.* those courts formed for the decision of only one or two kinds of questions, are the educational courts and the councils of revision.

a. *Educational courts.*—There are two grades of these: first, the departmental council and the academic council; and second, the superior council. These are all composed largely of *ex officio* members and particularly of persons engaged in the work of education and of members of the various recognized churches.<sup>1</sup> Like the other administrative courts they are also administrative councils, and as such are to advise the officers of the educational administration, and have quite a control over the pedagogical part of primary, secondary, and superior education. As administrative courts the departmental and academic councils hear complaints made by teachers against the acts of educational officers in the primary and secondary branches respectively. Thus *e. g.* if the prefect should revoke a teacher's certificate, without which he may not teach in either a public or a private school, such teacher may appeal to the departmental council or the academic council, according as he is a primary or secondary teacher. The academic council has also jurisdiction of all similar complaints that may arise in the superior as well as the secondary educational administration. The

<sup>1</sup> See for details, Simonet, *op. cit.*, citing L., June 14, 1854; L., Feb. 27, 1880, art. 9; and 1.

superior council has, as a council of advice, to give its opinion when asked on all matters connected with the subject of education, and as an administrative court to hear appeals from the departmental council as to matters relating to primary education, and from the academic council as to matters relating to secondary and superior education. As a court it has appellate jurisdiction alone, and its decisions as to questions of fact are final, but in case such decisions exceed its powers or violate a law appeal for excess of powers may be taken to the Council of State.

b. *The councils of revision.*—The councils of revision are governed by the law of July 27, 1872, and were formed for the purpose of deciding complaints which may arise as a result of the conscript laws. They are composed of both military and civil members, though the actual control is in the hands of the civil members. The prefect is the president. The civil elements are representatives of the general council, the council of the prefecture, the departmental commission, and of the councils of the *arondissements* of the departments over which the council of revision has jurisdiction. It moves about from canton to canton in the department, and revises the drawing of the lots which decide who shall serve in the army where there are a greater number of candidates for the army than are required, and decides on all cases of exemption from service in time of peace. Its decisions are generally final as to questions of fact, but may be appealed from to the Council of State on the ground of excess of powers and violation of the law.

In addition to these bodies there are also certain other commissions which are sometimes regarded as

administrative courts, such as the commissions of moneys and the commissions for levying assessments for local improvements.

3. *The supreme administrative court. The Council of State.*—The organization of this body has already been described and it has already been pointed out that it is the most important administrative council in the French system and, as such, advises the President of the republic and the various ministers.<sup>1</sup> It has also been pointed out that it is divided up into sections, four of which are administrative sections and are to advise the government in purely administrative matters, but that the fifth section is the judicial section whose duty is to do a large part of the work devolved upon the council in its capacity of administrative court. This judicial section is called the *section du contentieux* and is composed of five councillors of state and a certain number of commissioners (*maitres des requêtes*) and auditors. It decides alone all less important matters and for all the more important matters makes the preliminary examination, though in these cases the actual decision is made by the whole council which is then said to be acting *au contentieux*. The law of May 24, 1872, has given the council acting as an administrative court an absolute power of decision.

Its general administrative jurisdiction, *i. e.* the *contentieux administratif*, is both original and appellate. Its original jurisdiction may be said to be general, as an appeal may be taken to it from any decision of the President of the republic or of the ministers which violates a right; and it has the right to interpret all acts of the chief executive and the ministers which are

<sup>1</sup> *Supra*, I., p. 108.

administrative in character. In certain cases though not often, it has original jurisdiction of complaints against the action of the prefects.<sup>1</sup>

Further its appellate jurisdiction consists in the hearing of appeals from the decisions of the councils of the prefectures and of most of the special courts; and on such appeals it may review questions of fact and of expediency as well as of law.<sup>2</sup>

Finally the Council of State acts as a court of *cassation*, as a result of its jurisdiction of appeals for excess of powers and violation of the law.<sup>3</sup> Here the decision of the Council of State simply affirms or reverses the decision of the body whose act is complained of. It may not, as it may in the exercise of its ordinary appellate jurisdiction, substitute its decision for that of the authority from whose action appeal has been taken.<sup>4</sup>

<sup>1</sup> Aucoc, *op. cit.*, I., 588.

<sup>2</sup> *Ibid.*, 591.

<sup>3</sup> *Supra*, II., p. 229.

<sup>4</sup> Aucoc, *op. cit.*, I., 591.

## CHAPTER VII.

### THE ADMINISTRATIVE JURISDICTION IN GERMANY.

#### *I.—History.*

1. *From 1806 to the formation of the empire.*—When the old German kingdom and Holy Roman Empire was broken up in 1806 the administrative jurisdiction of the royal-imperial courts was completely destroyed and individuals were left at the mercy of the separate states which then came into being. The imperial administrative jurisdiction over the acts of the officers of the most important members of the empire was not very great as a result of the *privilegium de non appellando* which was possessed by most of them and in accordance with which appeals to the imperial courts against the acts of officers in these sections were not allowed.<sup>1</sup> The separate German states were very generally guided in their regulation of the relations of the courts and the administration by the new principle of the separation of powers which had been so fully developed by the French revolution. This had for its corollary, it will be remembered, the complete independence of the administration over against the courts, which were to be confined to the decision of private

<sup>1</sup> Meyer, *Deutsches Verwaltungsrecht*, I., 29; cf. Gneist, *Der Rechtsstaat*, cap. v.; *Das Englische Verwaltungsrecht*, I., 423, etc.

and criminal law cases. That is all complaints against the action of the administration, so far as they did not come within the domain of the private or the criminal law, were in Germany as in France to be decided by the administration itself; and perfect freedom of appeal from the decisions of the subordinate authorities to the higher authorities was provided. This condition of things did not, however, lead at first to great arbitrariness of action on the part of the administration. For the administrative authorities in their higher instances were so organized as to ensure to the individual almost the same guaranties of impartial action as were to be found in the courts.<sup>1</sup> They were organized for the most part as boards whose members had a tenure similar to that of the judges, *i. e.* practically during good behavior. When, however, the absolute monarchy was changed into the constitutional monarchy as a result of the revolution of 1848 all this was changed. The highest administrative authorities, the ministers, became partisans rather than the representatives of an impartial crown. The administrative organization became more single-headed in form and was more completely subordinated to the ministers.<sup>2</sup> The administration thus became an instrument which might be made use of by the political party which happened to be in power in the legislature to further its own ends; and as all of the great political parties were essentially social parties the danger became very great of the partisan application of the administrative law in the interest of some particular social class. In Prussia this was actually the case during the reactionary period

<sup>1</sup> Meyer, *Deutsches Verwaltungsrecht*, I., 32.

<sup>2</sup> *Supra*, I., p. 299; II., p. 188.  
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from 1850–60.<sup>1</sup> The conservative party which was the landholding interest, *i. e.* the nobility, got control of the administration and prostituted it in the interest of their own social class and to the detriment of other social classes. German publicists saw that some change must be made,—that some judicial control over the administration must be provided. The great question was how should this judicial control be formed? Should it be given to the ordinary courts or should there be formed special courts after the model of the French courts which by this time had shown themselves to be efficient protectors of individual rights? Prussia, where the condition of things was the worst, was the first to answer this question and answered it by granting in 1861 to the ordinary courts a control over certain administrative acts connected with the tax administration.<sup>2</sup> It is, however, to be noticed that a Prussian ordinance of as early a date as 1808 and another of May 11, 1842, had taken steps in this direction by permitting appeal to the courts in the case of police orders on the ground that they were absolutely contrary to law. Further, in case the law recognized an obligation on the part of the government to indemnify an individual for an invasion of his property rights the courts were permitted to decide as to the necessity and the amount of the indemnity. At about the same time Baden declared in favor of special administrative courts.<sup>3</sup> The progress of the reform in Prussia, however, was interrupted by the serious internal and external questions which presented themselves for

<sup>1</sup> *Supra*, I., p. 299.

<sup>2</sup> L. May 24, 1861; *cf.* Meyer, *Deutsches Verwaltungsrecht*, I., 31, *et seq.*

<sup>3</sup> See L. Oct. 5, 1863, cited in Meyer, *Deutsches Verwaltungsrecht*, I., 33.

solution and it was not till after the wars with Austria and France had been fought that the question was again taken up. It is therefore with the formation of the empire that the problem was definitely solved.

2. *Since the formation of the empire.*—As a result of imperial legislation the following is the condition of things: The imperial law organizing the courts maintains in theory the independence of the administration in its former extent,<sup>1</sup> but it and other laws have given to the courts in a few special instances a control over the administration,<sup>2</sup> while as a result of the general principle of German law which is in many cases formally expressed in the imperial statutes,<sup>3</sup> the courts control all private legal acts of the administration, *i. e.* when acting as *fiscus* it makes contracts or commits torts.<sup>4</sup> Other imperial laws also have provided in special instances for special administrative courts. The imperial legislation, however, leaves everything else to be regulated by the legislation of the separate members of the empire, simply providing that questions of competence between the administration and the courts shall be decided by a body in which the courts shall have a fair representation.<sup>5</sup>

## II.—*The general characteristics of the German system.*

1. *General canons of distinction.*—In the first place the action of the administration when acting as a public power is in theory both in the empire and in the separate members of the empire free from all judicial con-

<sup>1</sup> L. Jan. 27, 1877, art. 13.

<sup>2</sup> Loening, *op. cit.*, 787; Laferrière, *La Jurisdiction Administrative*, I., 37.

<sup>3</sup> As *e. g.* in the statute putting in force the code of civil procedure, secs. 4 and 5.

<sup>4</sup> *Supra*, II., p. 162.

<sup>5</sup> L. Jan. 27, 1877, sec. 17.

trol both from that of the ordinary courts and from that of the administrative courts except where the law has specifically laid down that it should be subjected to control. In the second place the particular cases where the administration is subjected to judicial control are of two kinds; either it is subjected to the control of the ordinary courts or it is subjected to the control of special administrative courts.

2. *The administrative jurisdiction of the ordinary courts.*—Individual liberty is protected as in France against attack on the part of the administration by the code of criminal procedure which makes it certain that a person who has been arrested may be able to have his case brought up at once before the ordinary courts for decision as to the legality of his detention.<sup>1</sup>

Again in most cases where power has been given to the administration to decide in first instance private law cases, as *e. g.* where police authorities are given, as is usually the case, the power to decide conflicts arising between innkeepers and their guests as to charges, appeals may be taken to the ordinary courts.<sup>2</sup>

Further in most cases where the law recognizes that the government is bound to pay an individual an indemnity for an invasion of his property rights, as *e. g.* in the case of the exercise of the right of eminent domain, the ordinary courts are to decide the amount of the indemnity but may not usually consider the question whether the administration was acting legally; the latter question is to be decided by the administration or the administrative courts as the case may be.<sup>3</sup>

<sup>1</sup> Stengel, *Wörterbuch des Deutschen Verwaltungsrecht*, sub verbo *Verhaftung*, citing arts. 114, 132, 341 of the code of criminal procedure.

<sup>2</sup> Sarwey, *Das Öffentliche Recht*, etc., 625.

<sup>3</sup> *Ibid.*, 633 et seq.

Still further, where the law permits administrative execution<sup>1</sup> in the enforcement of money payments due the government, appeal may be taken to the courts if such administrative execution is directed towards real rights—*dingliche rechte*.<sup>2</sup>

Finally in Prussia it is provided that the individual may appeal to the ordinary courts against the acts of the administration in tax and police matters, *i. e.* he may allege that the tax is already paid, or that he is relieved in some way from the payment, or that, as the result of some special statute or privilege, he is not liable to do the thing ordered by the police authority.<sup>3</sup>

### III.—*The administrative courts in Germany.*

These are to be found both in the empire and in its separate members. In the empire these administrative courts, though comparatively numerous, have a very limited jurisdiction, being confined, each of them, to the decision of a certain class of cases. In most instances they act at the same time as administrative authorities, this being the method adopted of making it certain that the members of the courts have the necessary special knowledge, and in one or two cases appeal goes from their decisions to the imperial court at Leipsic.

1. *Imperial courts.*—These are :

a. *The imperial poor-law board (Bundesamt für Heimathswesen).*—This tribunal decides all conflicts arising between the poor-law unions of different members of the empire relative to the duty of offering

<sup>1</sup> *Supra*, II., p. 127.

<sup>2</sup> *Ibid.*, citing law introducing code of civil procedure, sec. 4.

<sup>3</sup> Stengel, *Wörterbuch*, *sub verbo Rechtsweg* for this and for the provisions of a similar character, contained in the laws of the other members of the empire.

public charity to poor persons.<sup>1</sup> Its competence does not extend over Bavaria and Alsace-Lorraine, whose inhabitants are, from the standpoint of the poor-law, to be treated as foreigners. The separate members of the empire may by local statute provide that the final decision of conflicts between their own poor-law unions may be made by this authority. This has been done in Prussia, Hesse, and several others.<sup>2</sup>

b. *Imperial fortress belt commission*.—This body was organized by the law of December 21, 1871, and decides on appeal conflicts between the individual and the administration relative to the imposition of restrictions on real property within a certain distance of fortresses. It is to be noticed, however, that in accordance with the general principle already noted, all conflicts relative to the amount of the indemnity to be paid to the individual are to be settled by the ordinary courts.<sup>3</sup>

c. *Imperial railway court* (*Verstärkte Eisenbahnamt*).—This was organized by the law of June 27, 1873, and decides conflicts between the railway commission and the various railways when the railways claim that the commission has acted contrary to the law. In case of such an appeal certain judicial officers are added to the commission, which then takes on the name of the railway court, and is to act quite independently of the administration, which presents the case to it.

d. *Imperial patent office*.—This was organized by the law of May 25, 1877, and not only issues patents, but annuls and revokes them. In these last cases appeal goes to the imperial court at Leipsic.<sup>4</sup>

<sup>1</sup> L. June 6, 1870, sec. 42.

<sup>2</sup> See De Grais, *Verfassung und Verwaltung*, etc., 311, note 20.

<sup>3</sup> See Meyer, *Deutsches Verwaltungsrecht*, II., 163. <sup>4</sup> Cf. *ibid.*, I., 425.

e. *The disciplinary court and chambers.*—These bodies decide as to the removal of officers in the imperial administration, and the imposition upon them of disciplinary penalties.<sup>1</sup>

f. *The imperial superior marine office.*—This was organized by the law of July 27, 1877, and decides complaints against the decisions of the marine officers, either taking away licences from pilots and ship officers or refusing to prosecute them on the complaint of the marine commissioners.

The position of the members of the poor-law board seems to be more assured than that of the members of the other bodies. It is similar to that of the judges of the ordinary courts. The members of the other courts are for the most part merely administrative officers. But it must be remembered that all administrative officers have practically a tenure during good behavior and can be removed in the absence of criminal acts only as a result of a disciplinary procedure before the disciplinary courts. Therefore wherever the law says that these officers are to act independently of the administration, which is usually the case, they are not subject to the directions of the administration. For refusal to obey the commands of the administration would not probably be regarded as a case for the exercise of the disciplinary power. These courts are all of them thus practically independent of the administration. Their organization, which is often peculiar, and their jurisdiction are fixed in the laws organizing them.<sup>2</sup>

<sup>1</sup> *Supra*, II., p. 87.

<sup>2</sup> The details may be found in the laws which have been cited, or in Meyer, *Deutsches Verwaltungsrecht*, under the appropriate heading.

2. *The Prussian administrative courts.*—In the separate members of the German Empire the administrative courts are differently formed and possess a varied jurisdiction. The most completely organized courts and the courts which possess the widest jurisdiction are those of Prussia to which our future consideration will be confined.

a. *The jurisdiction of the Prussian administrative courts.*—Though the jurisdiction of the Prussian administrative courts has been modelled in large part on the jurisdiction of the French administrative courts, there are several points of essential difference. In the first place their jurisdiction does not include any of the decisions of the ministers which are not subjected as a rule to any administrative jurisdiction at all; nor does it as a general thing include the decisions of any of the officers of the central administration except in so far as they relate to the administration of internal affairs and to the purely local taxes. The control of the central taxes is in the hands of the central administration alone; for no special exception has been made in this case as has been made in the case of local taxes. In the second place it may be laid down as a general rule that no appeal to the administrative courts is open to the individual against the general acts of the administration, *i. e.* ordinances.<sup>1</sup> The appeal may be taken only from a special administrative act not of general application. Nevertheless on the appeal from a special act of the administration, performed in order to enforce an ordinance, the administrative courts may consider collaterally the question of the validity of the

<sup>1</sup> Stengel, *Organisation, etc.*, 458. There is no remedy in the Prussian system similar to the French appeal to the Council of State for excess of powers.

ordinance and may refuse to enforce the special act on the ground that the ordinance which it is issued to enforce is illegal.<sup>1</sup>

There are two general rules governing the right of appeal to the administrative courts against the special acts of the administration.

In the first place only those acts may be appealed from whose tendency is to violate private rights. As a result, however, of the enumerated jurisdiction of the administrative courts a provision of law must give the right to appeal even when a private right is violated. The special cases enumerated in the statutes are so numerous that almost every individual right, subject to the limitations mentioned above, is protected by an appeal to the administrative courts. The only exception to the rule that the existence of a special provision of law is necessary in order that recourse to the administrative courts may be had is in the case of the acts of the administration relating to what are called police matters, *i. e.* resulting from the exercise of the police power. Here the law distinctly says that the individual may appeal from the police orders of the administration on the ground that his rights are violated thereby, because the police authorities have not applied the law or have made a wrongful application of it on the ground that the conditions are not present, which by the law are necessary in order that the police authorities may act.<sup>2</sup> As these police orders constitute by far the larger number of the acts of the administration in the administration of internal affairs, and as this rule permits the administrative courts to review the decisions of the administration not only on ques-

<sup>1</sup> *Ibid.*

<sup>2</sup> *Ibid.*, 491.



tions of law but also on questions of fact, *i. e.* they are to determine whether the conditions made necessary by law for the action of the police authorities are present, it will be noticed that the control of the administrative courts over the administration of internal affairs is quite an extended one. Further, not only may individual persons appeal to the administrative courts, but also public corporations may appeal to these courts against the decisions of the supervisory authorities made in the exercise of the central administrative control over public corporations and their officers. Thus if the supervisory authority should insert an appropriation in the budget of a city for the payment of an expense which it regarded as obligatory, but which the municipal authorities did not regard as obligatory, the municipality might appeal from the decision of the supervisory authority to the administrative courts.

While the general rule is that the appeal to the administrative courts is open only in case of the violation of a private right, in a few cases it is permitted simply in the interest of the maintenance of the law. This is so *e. g.* in the case of elections. Here not only a defeated candidate but also any elector may appeal to the administrative courts against the decision of the election officers on the ground that it has violated the law.<sup>1</sup>

Finally in all cases where an appeal is made to the administrative courts the appeal is made in the same form, *i. e.* in the form of a complaint that injustice has been done. Like the appeal to the English quarter sessions the remedy is general though the jurisdiction of the courts is enumerated. As a general thing the

<sup>1</sup> Stengel, *Organisation, etc.*, 493.

appeal to the administrative court has a suspensive effect, and is therefore similar to the injunction in English law. But if the execution of the act complained of may not in the judgment of the administration be suspended without harm to the public weal, it may be executed notwithstanding the pendency of the suit. In no case, however, may the administration decree the arrest of a person until the case has been decided in its favor by an administrative court or until after the time provided for appeal to the administrative court has elapsed.<sup>1</sup>

b. *The organization of the Prussian administrative courts.*—The Prussian administrative courts may, like the French, be divided into courts of first instance, and appellate courts. For a large class of cases, however, there are three instances. For the appellate courts for some cases, are courts of first instance for others. What shall be the court of first instance in a given case is determined largely by the grade in the administrative hierarchy of the authority whose act is complained of.

The Prussians, like the French, and indeed like the English in the formation of the appellate jurisdiction of the courts of quarter sessions, have recognized the importance of having their administrative judges learned in the administrative law and have adopted practically the same method to attain the desired end. That is the judges in most cases are in other capacities engaged in the work of active administration. The only exception to this rule is to be found in the case

<sup>1</sup> *Ibid.*, 520 ; citing L. July 30, 1883, secs. 53, 133. This of course refers only to the decree of executive arrest as a means of executing the law. *Supra*, II., p. 121.

of the highest administrative court. In all cases, different from the French administrative judges and more like the English justices of the peace, the Prussian administrative judges are independent in tenure over against the active administration. Further in the lower instances the Prussian administrative judges, like the English justices of the peace, are laymen and are unpaid. The judges of the highest court are, however, professional lawyers and are salaried and are not engaged in active administrative work.

In detail the Prussian administrative courts are as follows :

First, the circle committee in the rural districts and the city committee in the city circles. These bodies have at the same time active administrative work to perform.<sup>1</sup> The circle committee is composed of the Landrath, who, it will be remembered, is the representative of the central administration in the rural circles and the executive of the circle as a local municipal corporation and is appointed by the Crown,<sup>2</sup> and of six members elected by the circle diet from among the inhabitants of the circle.<sup>3</sup> As these six members represent the lay non-professional element which is unsalaried, all professional officers of the administration are ineligible. In the city circles (*i. e.* cities of over 25,000 inhabitants) the city committee is composed of the burgomaster as president, and of four municipal citizens chosen by the city executive.<sup>4</sup> The president and one at least of the members must be qualified for the judicial or higher administrative courts. The jurisdiction of this, the lowest of the administrative

<sup>1</sup> *Supra*, I., pp. 315, 330.

<sup>2</sup> *Supra*, I., p. 315.

<sup>3</sup> *Kreisordnung*, sec. 181.

<sup>4</sup> L. July 30, 1883, secs. 37, 38.

courts, as enumerated in the statutes, embraces all cases which arise between communes relative to their boundaries and to the apportionment of common charges such as for roads and schools, local taxes, common enjoyment of public institutions and communal property ; complaints relative to the enjoyment or loss of membership in the commune or smaller city ; appeals in regard to communal elections, difficulties relative to the civil service, *i. e.* the imposition of disciplinary penalties on the non-professional officers ; appeals made by the local authorities from the decisions of the supervisory officers ; difficulties relative to the quartering of soldiers and military requisitions in time of peace ; various difficulties relative to the police of highways, waterways, building, commerce, industry, and hunting ; complaints against the action in local police matters of all local police authorities.<sup>1</sup>

Such in general is the jurisdiction of the circle and city committee, but in all these cases if the administrative authority from which appeal is taken is an important one the appeal even in these matters goes, not to the circle or city committee, but to the next highest court, the district committee. Thus in the matter of police appeals, if the action complained of has been taken by an authority of a city of over 10,000 inhabitants the competent administrative court is not the circle or city committee but the district committee.

Second, the district committee. This, like the circle committee, is an authority for the active administration but its territorial jurisdiction is much larger, extending

<sup>1</sup> Stengel, *Organisation, etc.*, 404 ; *cf.* Laferrière, *La Jurisdiction Administrative*, I., 47.

over the entire governmental district, which corresponds somewhat to the American county. It is however differently organized as an administrative authority and as an administrative court. In the first capacity the government president, the representative of the central administration in the district, is president, in the second capacity it is presided over by the administrative court director who is appointed by the Crown and is to be one of the two professional members provided by the law. These two professional members are to be appointed by the Crown for life and must possess, one, the qualifications for the judicial service, the other, the qualifications for the higher administrative service. In addition to the two professional members there are four lay members who are appointed by the provincial committee from among the inhabitants of the district.<sup>1</sup> The district committee has, as administrative court, original and appellate jurisdiction. It has appellate jurisdiction of the decisions of the circle and city committees and has original jurisdiction over the affairs of the rural circles and the cities of over 10,000 inhabitants similar to that which the circle committees has over the affairs of the communes and the less important cities.<sup>2</sup> The whole question of jurisdiction is settled by the competence law of 1883 which goes into the most minute details and settles not only the question whether appeal may be taken to an administrative court (*Verwaltungs-klage*), or whether it is to go to an administrative authority (*Verwaltungs-beschwerde*), but also determines to what court the appeal, when allowed, is to go.

<sup>1</sup> L. July 30, 1883, secs. 27, 28, *supra*, I., p. 307.

<sup>2</sup> Stengel, *Organisation, etc.*, 424; Laferrière, *op. cit.*, I., 49.

Third, the superior administrative court. This court sits at Berlin, and is the highest administrative tribunal. It is composed of judges who must be at least thirty years of age and are appointed by the Crown on the presentation of the state ministry. Half the judges must possess the qualifications necessary for the judicial service, the other half must be qualified for the higher administrative service.<sup>1</sup> It is divided, in order to facilitate the transaction of business, into sections or senates,<sup>2</sup> but in order to keep its decisions uniform, it is provided that, if any senate desires to depart from the decision of any other senate or from that of the general assembly of the court, the matter in question must be decided by the general assembly.<sup>3</sup> This court acts as a court of appeal, as a court of cassation, and in a few instances as a court of original jurisdiction. It acts as a court of appeal from the decisions of the district committee when it often acts as a court of third instance. Its jurisdiction as a court of cassation can with difficulty be distinguished from its jurisdiction as a court of appeal, the only difference being that when it acts as a court of cassation it does not as a usual thing decide questions of fact and simply quashes or affirms the decision of the court appealed from; whereas when it acts as a court of appeal it may decide questions of fact and may substitute its decision for that appealed from. As a court of original jurisdiction it decides as a rule simply complaints against the decisions of the highest of the officers in the localities, *viz.*, the governors of the provinces and the "governments" and the "government" presidents in the districts. When it acts in these particular capacities is decided

<sup>1</sup> L. July 3, 1875, secs. 17, 18.<sup>2</sup> *Ibid.*, sec. 20.<sup>3</sup> Sec. 29.

by statute which descends into the most minute details.<sup>1</sup>

Finally, the procedure in all of these administrative courts is generally oral, and the sessions are public, but this may be changed by consent. The procedure is also somewhat inquisitorial in character, but in the main controversial.<sup>2</sup>

It will be noticed that the general system of administrative courts in Prussia is based on the French plan, but care has been taken to avoid the appearance of dependence on the active administration, which is regarded by some writers as so serious a defect in the French system, as taking away in fact from the French administrative tribunals the characteristics of judicial bodies. The Prussians have also laid great stress on the non-professional character of the administrative judges, in imitation of the English courts of quarter sessions. The similarity to the English method is not accidental, but is due to the influence of that great student of English public law, Professor Gneist of the University of Berlin, to whose exertions was largely due the organization of the system, and who insisted on the dominance of the non-professional elements in courts whose duty it was to control so professional an administration as is the Prussian.

<sup>1</sup> Cf. Stengel, *Organisation, etc.*, 438 ; Laferrière, *op. cit.*, I., 50.

<sup>2</sup> Stengel, *Organisation, etc.*, 508 *et seq.*

## CHAPTER VIII.

### CONFLICTS OF JURISDICTION.

Our examination of the administrative jurisdiction in the various countries coming under consideration has shown that England and the United States have given this jurisdiction in first or in last instance to the ordinary courts, while France and Germany have with some exceptions put it into the hands of special administrative courts. While in England and the United States the possession by the ordinary courts of the administrative jurisdiction has resulted in the formation of a series of more or less special remedies and a very technical procedure,<sup>1</sup> the existence of special courts in France and Germany has brought about the possibility and indeed the probability of conflicts of jurisdiction between the two classes of courts, or between the ordinary judicial courts and the administration. Either the judicial courts attempt to encroach upon the competence of the administration or the administrative courts, and *vice versa*, when we have a positive conflict; or they both refuse to take jurisdiction on the ground that they are incompetent, when we have a negative conflict. It is necessary to provide

<sup>1</sup> An example of the technicality of the procedure may be found in the Virginia coupon cases, lately decided by the United States Supreme Court. See *Poindexter v. Greenhow*, 114 U. S., 270; *Hartman v. Greenhow*, 102 U. S., 672; *Antoni v. Greenhow*, 107 U. S., 769.



some means of settling these conflicts. This means has been provided in both countries which have given the administrative jurisdiction to special courts or to the administration itself. In France the Tribunal of Conflicts has been formed for the purpose of settling these conflicts; in Germany either a similar tribunal, known as a competence court, has been established, or else the power to settle these conflicts has been given to the ordinary judges. Where special conflict courts have been formed, the principle upon which they have been formed is essentially the same, that is that they shall be composed of an equal number of judges of the ordinary courts and of administrative judges. The law organizing the French Tribunal of Conflicts is that of May 24, 1872; that relative to this matter in Germany is the law organizing the courts of January 27, 1877, sec. 17, developed in its details in Prussia by Ordinance of August 1, 1879. This law provides in the first place that all conflicts of jurisdiction between the courts and the imperial administrative officers shall be settled by the ordinary courts themselves<sup>1</sup>; and in the second place permits the separate members of the empire to give the imperial courts the power to decide conflicts arising between the courts and administrative officers, but permits them at the same time to form special conflict courts. But if they avail themselves of the latter privilege the special courts provided must be so organized that one half of their members shall be at the same time members of the higher imperial courts, while the other half must be appointed for life. The only exception to this general principle in force in both France and Germany as to the equal

<sup>1</sup> Cf. Stengel, *Organisation, etc.*, 557.

representation in the conflict courts of both the judicial and administrative elements is in the fact that the president of the French Tribunal of Conflicts is the minister of justice. The administration would thus seem to have the casting vote in France. But it must be remembered that the minister of justice is almost as liable to declare in favor of the jurisdiction of the ordinary courts as in favor of that of the administration, since his duties connect him much more closely with the ordinary courts than with the administrative courts or the administration.

The method of raising the conflict as it is called or as we would say in America, of removing the cause, is in both countries practically the same. But it is arranged primarily to prevent the ordinary courts from encroaching on the power of the administration; and this is only natural since the whole system of special administrative courts is largely based upon the principle of the independence of the administration from the control of the ordinary courts. Thus in both France and Germany the power to remove the cause is given to an administrative officer only; and he is, in case a court is in his opinion attempting to encroach upon the competence of the administration,<sup>1</sup> to notify the court of the opinion of the administration. If the court believes the claim of the administration is well founded it will stop its action in the case, if it does not it opposes such claim and the question goes up directly to the conflict court for decision. In the German imperial administration no conflict can be raised, but the courts, *i. e.* the ordinary courts, decide the matter along with

<sup>1</sup> In France the prefect, Boeuf, *Droit Administratif*, 546; in Germany the provincial or district officers, Loening, *op. cit.*, 792, note 4.

other jurisdictional questions and in the same manner.<sup>1</sup> In those cases in which the conflict may be raised the notification by the administration of the removal of the cause suspends all proceedings before the ordinary courts until the decision of the conflict court is made.<sup>2</sup> In France one means has been provided of preventing the administrative courts from encroaching upon the jurisdiction of the ordinary courts. The ministers have the right to remove any matter before the Council of State, which they believe belongs before the ordinary courts, into the Tribunal of Conflicts, if the Council of State on demand refuses to declare itself incompetent.<sup>3</sup> It must be noted that the exercise of such a check on the administrative courts is in the hands of the administration and not in those of the judiciary. The minister of justice has, however, the same right in this respect as the other ministers.

In case of negative conflicts the individual concerned is to bring the matter before the court of conflicts where that exists.<sup>4</sup> In France, however, an interested minister and particularly the minister of justice may bring the matter before the Tribunal of Conflicts.<sup>5</sup> In the case of the positive conflict it is provided in the interest of vested rights, that the cause must be removed, in Germany before judgment,<sup>6</sup> in France before final judgment, in the ordinary courts.<sup>7</sup>

The existence of these conflicts is one of the greatest disadvantages of the system of special administrative courts. It is a greater disadvantage probably than the

<sup>1</sup> Stengel, *Organisation, etc.*, 597.

<sup>2</sup> Boeuf, *Droit Administratif*, 549; Loening, *op. cit.*, 793.

<sup>3</sup> Boeuf, *op. cit.*, 550, citing L. May 24, 1872, art. 26.

<sup>4</sup> Boeuf, *op. cit.*, 554; Loening, *op. cit.*, 793.

<sup>5</sup> L. Jan. 27, 1877, art. 17.

<sup>6</sup> Boeuf, *op. cit.*, 554.

<sup>7</sup> Boeuf, *op. cit.*, 546.

special character of the remedies and the technical character of the procedure in the administrative jurisdiction of the ordinary English and American courts. For in the case of a positive conflict the decision of a private law case may be greatly delayed, while in the case of a negative conflict an individual may be obliged to apply to both classes of courts and to the conflict court before he knows which court is the proper one. Cases have occurred in France in which a suitor has gone through all the ordinary courts up to the Court of Cassation only to be told that the ordinary courts are incompetent, has then applied to the administrative courts and finally obtained the decision of the highest one of these, the Council of State, only to be told here also that the administrative courts were incompetent and has then been obliged to appeal to the Tribunal of Conflicts and after all the trouble and expense necessitated by this long litigation is only in the position of suitor beginning litigation with a knowledge of the court which has jurisdiction of his case. Of course much of this trouble is avoided in the administrative system of the German Empire where, as in the United States, in the matter of the jurisdiction of the United States and commonwealth courts, the supreme judicial court has the final power of decision. But while this method is of course of great advantage to the suitor it must be remembered that by it the independence of the administration, which is one of the main reasons for providing special administrative courts, is not so well assured.

### *Division III.—The Legislative Control.*

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## CHAPTER I.

### HISTORY OF THE LEGISLATIVE CONTROL.

The history of the legislative or parliamentary control must be studied in the history of English institutions, since England developed the modern legislative body. In the historical sketch which has been given of the English administrative organization<sup>1</sup> it was seen that there was gradually developed by the side of the absolute Norman king a body composed at first of the *meliores terras* and finally of the representatives of the entire population of the kingdom. One of the most important functions of this body, the Parliament, was from the earliest times to redress grievances. Even so late as the latter part of the middle ages much of the time of Parliament was taken up in the discharge of this function. The grievances which the Parliament sought to redress not only were notable abuses in the government but were found in the most minute details of the government. Indeed at first, the main means of controlling the administration, not only in the interest of society at large but also in that of individual rights, was to be found

<sup>1</sup> *Supra*, I., pp. 98, 122.

in this parliamentary control. As a result of the government of the Stuart kings two facts, however, became apparent. The first was that the party conflicts which are so apt to arise in Parliament made it an improper authority for the exercise of such an extended control; the second was that the parliamentary control was altogether insufficient for the protection of individual rights against an arbitrary and corrupted administration. These defects in the system of control over the administration were remedied by increasing the independence of the local organs and of the courts, and the consequent increase of the judicial control over the administration.<sup>1</sup> The parliamentary or legislative control was in this way reduced to the position of a subsidiary but at the same time a necessary control.<sup>2</sup> The general redress of grievances was therefore made by the courts and Parliament redressed only grievances of an extraordinary character. Petitions for redress of grievances from this time on took on the character more of propositions *de lege ferenda*. At the same time Parliament began to increase its control over the administration in other directions. Thus it began to specify in its appropriation acts the purposes for which money might be spent by the administration. The spending of money had been before 1676 altogether an affair of the royal prerogative with which the Parliament had not interfered. But it was led to assume this power as a result of the wasteful administration of the kings,<sup>3</sup> and as a result of the fact that through this power it could exercise a very efficient control over the general policy of the execu-

<sup>1</sup> Gneist, *Das Englische Verwaltungsrecht*, 1884, 345.

<sup>2</sup> Gneist, *loc. cit.*

<sup>3</sup> *Infra*, II., p. 280.

tive. Further in order that this power might be of any value it was necessary for the Parliament to assure itself in some way that the administration had conformed in its actions to the provisions of the appropriation acts. It therefore, somewhat later, began to examine the accounts of the administration. Again while the Parliament still retained its former power of impeaching the ministers of the Crown in case of their continued and wilful disobedience of the resolutions of Parliament and violation of the law of the land, it added very much to its powers of control by insisting that the ministers of the Crown should be such persons as could obtain and retain the confidence of Parliament. The result of the development of this principle of the responsibility of the ministers led to a further increase of the control of the Parliament, which is not capable of exact juristic determination, and which has practically resulted in the abandonment of the power of impeachment.

The formerly all embracing parliamentary control has been reduced thus practically to the exercise of three powers which are largely subsidiary to the other methods of control. These three powers are: first, the power to remedy special abuses in the interest of the social well-being by entertaining propositions *de lege ferenda* and by investigating the conduct of the administration; second, the power of controlling the general policy of the administration through the voting of the appropriations and the examination of the accounts of the administration after the execution of the budget in order to see whether the provisions of the appropriation acts have been observed; and third, in the extraordinary power of impeachment, to be made use of

only when all else fails to bring the administration within the bounds of the law. This power is supplemented by the principle of the responsibility of the ministers to Parliament, and is largely replaced in actual practice by that principle.

Such was the form of the parliamentary or legislative control in England at the time the general English system of constitutional government was introduced into the governmental system of constitutional states, which have generally adopted it, subject, however, to those modifications made necessary by their peculiar constitutional system.



## CHAPTER II.

### THE POWER OF THE LEGISLATURE TO REMEDY SPECIAL ADMINISTRATIVE ABUSES.

The exercise of this power may result from petitions which have been sent to the legislature by individuals. For almost all constitutions guarantee to the individual the right to address petitions to the government, and the legislature is the place where most of such petitions go. The legislature may further act of its own motion as it is generally on the watch for administrative abuses. The means of exercising this control are the passing of resolutions condemnatory of the administration, the putting of questions or interpellations to the administration, and, in case satisfactory answer is not made by the administration, the undertaking on the part of the legislature, through committees appointed by it, of investigations which may have in view either the unearthing of abuses which have been suspected or obtaining information *de lege ferenda*. The extent and influence of the power in all these cases of its exercise depends very largely upon the character of the relations of the executive and the legislature as fixed by the constitution. If in the special political system the executive power is independent of the legislature such control loses all its sanction, except in so far as it may be used for the purpose of legislative reform (*de lege*

*ferenda*). But on this account alone the legislatures of all states, even of those where the executive is independent of the legislature, have large powers of control over the administration. For the legislature through the passage of laws may circumscribe the action of the administration so far as discretionary powers are not guaranteed to it by the constitution, which is not often the case. In those countries, however, where the executive is dependent upon the legislature, this control has a most powerful sanction. For the action of the legislature may result in an expression of its lack of confidence in the ministry, which is then bound to step out and give place to a ministry whose conduct will satisfy the legislature. From this point of view the countries under consideration may be divided into two classes. In the first will be found the United States and Germany, not only in their central but also in their commonwealth organizations; in the second class are to be placed England and France.

*I.—Where the administration is independent of the legislature (United States and Germany).*

In the United States and Germany this control is exercised in all the ways which have been mentioned. In Germany it is, however, more efficient than in the United States. For, though the administration is independent of the legislature in tenure, it is customary for the highest administrative officers, *i. e.* the ministers, to be present at the sessions of the legislature. Being present they are naturally forced to answer questions put to them. This obligation seems to be simply a moral one, their refusal to answer or their unsatisfactory answer leading to no legal or political results. Still

the mere fact that officers of the administration are present and practically have to answer questions put to them has an important moral effect in making them conduct their offices properly. This method of exercising a control over the administration by the legislature is called on the continent interpellation. In the United States such a method of control is not even so important as it is in Germany for the simple reason that the officers of the administration are never present at the sessions of the legislature; and therefore there is no opportunity for the legislature to question them personally, although, as the result of resolutions passed by either house of the legislature, questions may be put which the administration may answer or not as it sees fit. In neither Germany nor in the United States do resolutions condemnatory of the administration have any political or legal effect, though in both countries the legislature has the right to pass such resolutions. Further their moral effect does not seem to be very great.

All the control that the legislature can exercise over the administration in the United States and Germany other than the moral one just alluded to is to be found in the powers of the standing committees of the legislature and of the special investigating committees which from time to time may be appointed. In the United States there is usually one such standing committee for each administrative department. The main function of such standing committees is to scrutinize carefully the way in which the business of the particular department is transacted. The special committees are formed for the purpose of investigating some particular abuse in the administration whose existence is alleged

by individuals or has come to the notice of the legislature. Real authority such committees do not have, except where the legislature may have the power of removal. Their action can result simply in new legislation. Further their power of obtaining information either from the officers of the administration or from private individuals is often not a great one. This is true, particularly of the committees of the national Congress. For quite a time it was supposed that, as a result of a decision of the United States Supreme Court,<sup>1</sup> Congress and its committees had full power to punish witnesses for contempt who refused to answer questions put to them; but the same tribunal in a more recent case has limited very greatly this power. It has decided<sup>2</sup> that a congressional committee had no power to punish a witness for contempt in refusing to answer questions in regard to matters over which Congress had no jurisdiction; and, while the Supreme Court expressly refused to decide whether Congress had the power to force a witness to testify in cases where it desired information for its use in legislation, it seems to indicate in its opinion that Congress has no such power. Nothing, however, prevents Congress or its committees from gathering testimony from willing witnesses. When we come to the commonwealths it is not so easy to say exactly what is the power of the legislature in this respect. It is easily conceivable that the legislatures of the commonwealths might have this power although it is not possessed by the national Congress. For there is no principle of our constitutional law which is clearer than that, while

<sup>1</sup> *Anderson v. Dunn*, 6 Wheaton, 204.

<sup>2</sup> *Kilbourn v. Thompson*, 103 U. S., 168.

Congress is an authority of enumerated powers, the legislatures of the commonwealths may do anything which they have not been expressly forbidden to do by the constitution.<sup>1</sup> And seldom do we find in the commonwealth constitutions any provisions which clearly take away any such power from the commonwealth legislatures. Indeed in the constitutions of twenty-four of the commonwealths<sup>2</sup> such power of punishing for contempt would seem to be granted. The constitutions of several of the commonwealths provide that the legislature shall have "all other powers necessary for the legislature of a free state."<sup>3</sup> The constitution of Massachusetts has been so interpreted by the supreme court of the commonwealth as to give a committee, appointed for the simple purpose of investigation, the power to punish witnesses for contempt.<sup>4</sup> Finally in the case of those commonwealths whose constitutions contain no provision as to this point we have several cases which throw light on the subject. Most of these cases are in the courts of New York, which has exercised this power more frequently than the other commonwealths. Here it has been decided that the legislature or its committees, to which it has delegated the power of investigation either by statute or by resolution, have the power to punish for contempt.<sup>5</sup> The latest case on the point<sup>6</sup> imposes an apparent limitation

<sup>1</sup> See *Bank of Chenango v. Brown*, 26 N. Y., 467, 469; *People v. Dayton*, 55 N. Y., 380.

<sup>2</sup> Alabama, Arkansas, Colorado, Connecticut, Delaware, Florida, Illinois, Indiana, Iowa, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, and West Virginia. See F. W. Whitridge on "Legislative Inquests," in *Pol. Sci. Qu.*, I., 84, 89.

<sup>3</sup> *Ibid.*, 89.

<sup>4</sup> *Burnham v. Morrissey*, 14 Gray, 226.

<sup>5</sup> *People v. Learned*, 5 Hun, 626; see also *Wilckens v. Willet*, 1 Keyes, 521, 525.

<sup>6</sup> *People ex rel. McDonald v. Keeler*, 99 N. Y., 463.

on this power in that it says that the legislature or one of its committees may only punish for contempt witnesses who refuse to answer questions put with the desire of obtaining information for the future legislative action of the legislature; but, as it at the same time admits that the court cannot judge of the intention of the legislature, all that the legislature has to do in order to bring itself under the rule stated in this case is to declare in the resolution appointing the committee that it desires such information.<sup>1</sup> But even if the legislature does not possess this power, still as a matter of fact the officers of the administration will usually comply with the summons of an investigating committee of the legislature, and will answer all reasonable questions put to them since "desiring legislation and always desiring money [they have] strong motives for keeping on good terms with those who control legislation and the purse."<sup>2</sup> It would seem that the German law recognizes as belonging to the legislature a similar control over the administration through the appointment of investigating committees.<sup>3</sup>

## II.—Where the administration is dependent upon the legislature (France and England).

When we come to consider those states whose political system recognizes that the administration is dependent upon the legislature we find that this kind of control of the legislature over the administration is very much greater. Since the administration must keep the con-

<sup>1</sup> See also the case of *Ex parte Dalton*, 44 Ohio St., 142, which holds that the legislature may punish for contempt in election cases.

<sup>2</sup> Bryce, *American Commonwealth*, I., 154.

<sup>3</sup> Stengel, *Deutsches Verwaltungsrecht*, 204.

fidence of the legislature it must, in the nature of things, defend its policy when it is attacked and, since the legislature may at any time force the ministry out of office, it may investigate and censure the administration at such times and in such manner as it sees fit. Indeed the sanction of the control is so great that the control itself will amount in actual practice to just about what the legislature sees fit to make it. If the legislature does not impose bounds upon its control it may through its exercise practically take the place of the administration or reduce the administration to such a weak position that it will be all but impossible for it to transact properly the business in theory assigned to it. This the legislature has done in France. Interpellations, addresses, questions as to its policy and censures of the action of the administration have been so frequent that the French acting executive has been completely terrorized and paralyzed; and the control which the legislature possesses and which, in order that the government may be well conducted, should be used with moderation, it has made use of to deprive the administration of almost all discretion and practically to concentrate in the legislature many administrative functions. The existence of such a control presupposes that the ministers will guide the legislature, that they will have its confidence, which shall not be withdrawn for trivial reasons. The ministry in such a political system serves or should serve the purpose of the standing committees of those legislatures in which the ministry is not represented. Where this is not the case, as it is not the case in France, the ministry and the administration become the servants rather than the guides of the legislature and naturally become so

anxious to win the approval of the legislature that they are unable wisely to conduct the government. If this legislative control is not to degenerate into the performance by the legislature of administrative functions it is necessary that the legislature limit its exercise of this method of control. This is exactly what the legislature has done in England. There the ministry are not the servants of the Parliament but on the contrary are their guides, the great standing committee of the Parliament which is to direct all its business subject to the necessity of getting the general approval of the Parliament on its policy taken as a whole. This matter of the parliamentary control in England is treated very fully by Mr. Todd in his *Parliamentary Government in England*.<sup>1</sup> He lays it down as the general rule that Parliament is designed for counsel and not for rule,<sup>2</sup> for advice and not for administration. On the authority of May it is said that "its power is exercised indirectly."<sup>3</sup> Since the passage of the reform bill of 1867, however, the House of Commons has shown a disposition to encroach more and more upon the sphere of government. It regards any matter as the proper object for its censure. Resolution after resolution is proposed with the object of expressing the disapproval of Parliament of some particular administrative practice or measure<sup>4</sup>; and if the result of such a resolution is the disapproval of Parliament, according to May "ministers must conform to its opinion or forfeit its confidence." Many of the precedents cited by Mr. Todd go, however, to show that Parliament does not always in unimportant matters,

<sup>1</sup> 2d Ed., I., Chapters vii.-xii.

<sup>2</sup> *Ibid.*, I., 414.

<sup>3</sup> *Ibid.*, 421.

<sup>4</sup> See precedents cited by Mr. Todd, *op. cit.*, I., 422.

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even in case of its disapproval, go so far as to force the ministry to resign or even to conform to its views. The concrete result depends very largely upon the character of the individual case. It may be laid down as a general rule that Parliament may not, as a result of this control, proceed to give orders to any of the subordinate officers of the government, as this is regarded as actual administration rather than control.<sup>1</sup>

Of late years it has become a common practice for Parliament to appoint what are known as select committees for the purpose both of acquiring information with a view to legislation and of examining into the constitution and management of the various departments.<sup>2</sup> Such committees are appointed either at the suggestion or with the approval of the government. But both parties are represented on them though the party in the majority in the house itself is given the majority. After taking evidence from every available source, and it would seem that such committees have the power to punish for contempt the refusal to answer questions,<sup>3</sup> the committee reports to Parliament, generally embodying in its report practical suggestions which are submitted for the consideration of the government.<sup>4</sup> It is usual to leave to the administration the initiation of the necessary measures.<sup>5</sup> Finally as a result of its powers of control and investigation Parliament may demand the presentation by the administration of papers and documents, though the rule generally is that Parliament will not require the government to bring forward any papers which in its opinion should be kept secret for political reasons.<sup>6</sup>

<sup>1</sup> Todd, *op. cit.*, I., 421.

<sup>2</sup> *Ibid.*, I., 428.

<sup>3</sup> May, *Parliamentary Law and Practice*, 73, 74.

<sup>4</sup> Todd, *op. cit.*, I., 432.

<sup>5</sup> See precedents, *Ibid.*

<sup>6</sup> *Ibid.*, I., 439 *et seq.*

## CHAPTER III.

### THE LEGISLATIVE CONTROL OVER THE FINANCES.

Through its control over the finances the legislature exercises a control over the general policy of the administration. For the conduct of the entire administration is closely connected with the amount of money which may be spent. The control over the finances is to be found in three powers: first, in the power any given legislature has to fix the amount of money which is to be spent by the administration for the coming budgetary period; second, in the power it has to fix the purposes for which money has to be spent; and third, in the power it must have, if the second power is to amount to anything, to ascertain, after the expenditure of the money, whether the administration has acted in accordance with the provisions of law fixing the amount to be spent and the purposes for which money is to be spent.

#### *I.—Control over receipts.*

The legislative control over the finances in its modern form was, like the other methods of legislative control, developed by England. Originally the only way in which the English Parliament endeavored to control the financial administration was by fixing the amount of money which could be raised by the Crown by

means of imposing taxes upon the people. The Parliament did not attempt to control the amount of money which could be spent nor the purposes for which it should be spent.<sup>1</sup> This was also true of the early American colonial government.<sup>2</sup> The later development has reversed this condition of things. At the present time most of the receipts, *i. e.* taxes, are fixed by permanent law. No given Parliament has much to do with receipts. For its action is no longer necessary in order that the receipts shall come in. So long as the law establishing the taxes is not repealed, which will require the combined action of both houses of Parliament, the administration may go on collecting the taxes regardless of Parliament, providing it acts in accordance with existing law.<sup>3</sup> This principle has been introduced into the United States. Thus in the national government the customs duties and the internal revenue taxes, from which two sources most of the revenue of the national government is obtained, are both fixed in amount by permanent law in that the rates which may be levied are so fixed. The amount of money which is received from these sources is independent of the action of any particular Congress and depends rather upon the business and prosperity of the country. If the houses of Congress take no action on these matters the duties are still levied. This is true also of the other receipts of the national government, such for example as tonnage dues and the receipts of the post office and from the sale of public

<sup>1</sup> Cox, *Institutions of the English Government*, 199.

<sup>2</sup> *Supra*, I., p. 53.

<sup>3</sup> Gneist, *Das Englische Verwaltungsrecht*, 1884, I., 431; II., 715. At the present time almost the only tax which is fixed in amount by each Parliament is the income tax.

lands. A given Congress has generally therefore nothing to say as to the amount of the receipts of the government. In order to change it in any way either the two houses and the President must agree or the two houses of Congress must act by a sufficiently large majority to overcome the veto of the President.

The same rule is generally true of the receipts in Germany with the exception of those of the imperial government. Some imperial receipts are indeed fixed by permanent law, as *e. g.* the receipts from the post office. But these receipts constitute a very small part of the total receipts of the empire. The greater part is to be found in the matricular contributions which the separate members of the empire have to pay into the imperial treasury and whose amount is settled largely in accordance with the population of the particular member. The separate members are allowed to collect in accordance with imperial laws taxes on imports, *i. e.* customs duties, and on objects of domestic consumption and manufacture, *i. e.* internal revenue, in order to pay such matricular contributions. The actual amount of these contributions is to be fixed annually by the imperial legislature.<sup>1</sup> Therefore the larger part of the receipts is under the control of each imperial legislature and if one of the houses of the legislature fails to act or if both houses fail to agree, while the taxes might still be levied in the particular members of the Empire the receipts from them would not be at the disposition of the imperial administration. In the separate members of the German Empire, however, we find as a rule the receipts independent of the yearly action of the legislature. Thus in Prussia, the consti-

<sup>1</sup> Imperial Constitution, Art. 70.

tution provides<sup>1</sup> that the taxes as fixed by law shall continue to be collected until the law fixing them has been amended or repealed which, it will be remembered, may not be done without the consent of the Crown, the chief of the administration.

In France the action of each legislature each year seems to be necessary in order that the receipts may come in, and thus each legislature has almost complete control over the receipts. It was thought by the French constitution-makers that they were introducing into their public law the principles of the English law when they adopted this rule. But they knew the English law only from such works as those of De Lolme and Benjamin Constant. These writers, particularly Constant, obtained their knowledge of English public law almost entirely from Blackstone, who fails to lay the stress he should on the principles which are back of the law, but which are still of great importance.<sup>2</sup> As Blackstone speaks of taxes being imposed only with the consent of the legislature, and lays great stress upon the powers of Parliament to withhold supplies, it was only natural for French publicists to believe that the taxes were completely in the control of each particular Parliament, and that if there were not a common action of both houses it would be impossible for the Crown to obtain supplies. Therefore in their new constitutions the French adopted in its extreme form the principle that taxes must be voted annually by the legislature. It is true that such taxes as the customs duties are fixed, as regards their rate,

<sup>1</sup> Art. 109.

<sup>2</sup> See Gneist, *Das Englische Verwaltungsrecht*, I., 433, note; *Ibid.*, *Gesetz und Budget*, 85.

by a permanent law. But in accordance with the theory, it is at the same time provided that, in order that even such rates be collectible by the administration, annual action or authorization by the legislature is necessary; and it is an actual crime upon the part of any administrative officer to collect a tax which has not been so authorized.<sup>1</sup> Finally the ordinary courts are to decide whether a tax which the administration attempts to collect is legal.<sup>2</sup>

We find similar instances of the annual vote of taxes by the legislature in some of the American commonwealths. Indeed this seems originally to have been all but the universal rule as a result of the kind of tax which was adopted. This was the general property tax, and the way in which it was levied was to ascertain the amount of money to be spent, and then apportion it out among the counties of the commonwealth. This of course necessitated action by the legislature at each of its sessions. But with the recent changes in the tax system the control each legislature has over the receipts has been considerably lessened. For many of the taxes are now fixed as to rate by permanent law, *e. g.* the corporation tax and the inheritance taxes, and the action of any particular legislature is no longer necessary to their collection.

## *II.—Control over expenses.*

It has already been pointed out that the English Parliament originally contented itself in the exercise of its control over the financial administration with fixing the amount of the supplies obtained from taxa-

<sup>1</sup> See Constitutional Law, Feb. 24, 1875; Penal Code, art. 174; Ducrocq, *Droit Administratif*, I., 544.

<sup>2</sup> Ducrocq, *loc. cit.*

tion which were to be placed at the disposition of the Crown. It did not attempt in any way to exercise a control over the disposal by the Crown of the money in its control, regarding the spending of money once raised as peculiarly a part of the royal prerogative. But the abuses of the financial administration particularly by the Stuart kings led the Parliament to begin soon after the restoration, *viz.*, in 1676, regularly to designate the purposes for which the money should be spent, by the insertion in the grant of what was known as an "appropriation clause."<sup>1</sup> This clause not only designated the purposes for which money was to be spent but also forbade the Crown to make any other use of the money granted than that expressed in the clause.<sup>2</sup> It must be remembered, however, that this clause at first affected only the extraordinary revenue of the Crown, *i. e.* the revenue coming from taxation, and was also of a very general character. But with the gradual enormous increase of the extraordinary revenue and at the same time the decrease not only in importance but also in actual amount of the ordinary revenue (*i. e.* the revenue from the royal domains, *etc.*) the legislature got into its hands the control of most of the expenses of the government as well as that of the receipts which at this time had not become permanent. The result was a very unstable condition of the finances. This, it was felt, weakened the power of the state particularly since, as a result of the foreign policy of England during the reign of William III, a large debt had

<sup>1</sup> Cox, *Institutions of the English Government*, 199. Cox cites here much earlier instances of such appropriation clauses but says they were of rare occurrence.

<sup>2</sup> In 1680 Sir Edward Seymour, the Treasurer, was impeached for not observing such clauses. *Ibid.*, 200, note (a), citing 8 State Trials, 127.

grown up. This instability was remedied in the following way: In the first place the receipts were made stable by establishing the taxes by permanent law instead of making the action of each Parliament necessary in order that they might flow into the treasury. Further all the revenues were to be paid into what were called the funds, *viz.*, the General Fund, the South Sea Fund, the Aggregate Fund which were later consolidated in the Consolidated Fund.<sup>1</sup> In the second place in order to insure the stability of certain at any rate of the expenses it was provided that such expenses should be paid out of these funds as a result of a permanent law. Such was particularly the case with the interest on the public debt which, it was felt, should not be dependent on the annual action of the Parliament.<sup>2</sup> When the special funds were consolidated into the Consolidated Fund these expenses became chargeable upon the Consolidated Fund. Two further facts contributed to increase the stability of the expenses. The ordinary revenue of the Crown was not controlled by Parliament; and from it were defrayed quite a number of expenses such as the salaries of the judges and of ambassadors. Further, the revenues from customs and inland revenues were for a long time reported net. That is, the expenses of their collection were defrayed from the receipts and the balance only was paid into the Consolidated Fund.<sup>3</sup> This arrangement was, however, felt by Parliament to give it too little control over the expenses, so it was finally provided that the ordinary revenue of the Crown should like

<sup>1</sup> 27 Geo. III., c. 13.

<sup>2</sup> See 3 Geo. I., c. 7; Gneist, *Das Englische Verwaltungsrecht*, 1884, 686.

<sup>3</sup> Gneist, *op. cit.*, 688.



the extraordinary revenue be paid into the Consolidated Fund, and that the expenses which had been defrayed from it, as *e. g.* the salaries of the judges and of ambassadors and the civil list of the Crown, should thereafter be paid out of the Consolidated Fund as a result of permanent law.<sup>1</sup> This is regarded as somewhat in the nature of a contract between the Crown and Parliament, and is renewed regularly at the accession of each ruler. The civil list of the Crown is, it is said, just about equal to the revenues transferred to the fund in this way.<sup>2</sup> Further within almost the last generation it has been provided that the receipts from customs and internal revenue shall be reported by the Crown to Parliament in gross and paid into the fund in gross. Parliament has thus obtained control of the expenses of collection and administration inasmuch as they are not to be paid out of the fund in accordance with permanent law.<sup>3</sup> The result of this arrangement is that the Crown presents each year to Parliament estimates for the following expenses which are in the control of each Parliament; Army estimates, Navy estimates, Miscellaneous Civil Service estimates, and Revenue Department estimates which are divided up into about 200 appropriations.<sup>4</sup> These are the only expenses of the government over which Parliament exercises an annual control. It does not therefore exercise an annual control over the civil list of the Crown, the expenses of the public debt, or the salaries of judges or ambassadors, but does over the army and navy estimates. The reason why the army and navy

<sup>1</sup> See I. Geo. III., c. 3.

<sup>2</sup> The fund is now regulated in its main features by 17 and 18 Vict., c. 94.

<sup>3</sup> Gneist, *op. cit.*, 688.

<sup>4</sup> Gneist, *op. cit.*, 691, 692, citing Parl. Papers, 1880, xlv., xlvi.

estimates are voted every year is to be found in the experience of the people under the reigns of the Stuarts and during the Commonwealth when the army was used to oppress them. Again the geographical position of England is such as not to make it absolutely necessary that the strength of the army shall be independent of the chance of an agreement of both houses of Parliament. It is to be noted that, notwithstanding the fact that Parliament has, as has been shown, quite a large control over the expenses of the government, it has always been very careful not to interfere very much with the estimates as presented by the Crown. It has never refused to approve the estimates as a whole, but has usually contented itself with making minor changes in them. It is felt that the refusal to vote the estimates would tend too much to cripple the administration; and the principles of ministerial responsibility to Parliament have brought about the recognition of the fact that a sensible alteration of the estimates as brought in by the administration is equivalent to the expression of a lack of confidence in it and will in almost all cases be followed by the dissolution of Parliament or the resignation of the ministers.<sup>1</sup> It is further to be noted that the position of the ministers as the great standing committee of Parliament, which is to examine, before it is presented, every important measure and is to guide the deliberations of Parliament, has brought about the adoption of the rule that no appropriation of any importance is to be made except on the proposition of the Crown, *i. e.* the administration. It may happen in isolated cases that the house will address the Crown to the effect that certain

<sup>1</sup> Gneist, *op. cit.*, 723.

appropriations be made, but it is not customary for appropriations of any importance to originate otherwise than with the Crown. This is now fixed by a standing order of the House of Commons.<sup>1</sup> Finally it has been decided as a result of long practice that the control of Parliament over the appropriations shall not be so made use of as to compel the administration to take action which it believes is unwise. That is Parliament may not tack to an appropriation bill any clause or provision foreign to it. Whenever such an attempt has been made by the House of Commons the House of Lords has regularly thrown out the objectionable bill.<sup>2</sup>

In the United States a somewhat similar method of insuring the stability of certain of the expenses has been adopted. As has been shown the receipts are permanent. The statutes of Congress have also provided for quite a number of appropriations which are based upon permanent law. The growth of the national debt made the Congress feel the same fear that had been felt before in England as to the effect on the public credit of the country of the dependence of interest and sinking fund payments on congressional action. There was therefore adopted a system of what were called permanent annual appropriations established by permanent law which should be sufficient authorization to the administration to make the necessary payments without any special action on the part of the Congress. Among these permanent annual appropriations are to be mentioned, in addition to the debt payments, the expense of collecting the customs

<sup>1</sup> Standing Order of June 25, 1852, cited in Cox., *op. cit.*, 192.

<sup>2</sup> Gneist, *op. cit.*, 727, citing Amos, *English Constitution*, 73.

duties, the salaries of judicial officers, and the expense of purchasing a certain amount of silver each year in the endeavor to keep up the price of silver and to bring about ultimately the adoption of the complete bimetallic standard. This last permanent annual appropriation may be evidenced as a striking example of the importance of these permanent appropriations to those who are interested in the stability of a certain expense. Finally as a result of the decisions of the Supreme Court<sup>1</sup> the fixing of salaries by permanent law, which is often the case, is regarded much as a permanent annual appropriation. For the officer whose salary is thus fixed may sue the government for it. The salaries would thus have to be paid regardless of the action of Congress unless such action was by a majority sufficient to override the President's veto. This decision of the Supreme Court has vastly increased the independence of the administration.<sup>2</sup> It is indeed true that the act organizing the Court of Claims provides that judgments against the United States shall be paid out of the appropriation for private claims; but in time of conflict between the Congress and the President it is very probable that the President would conduct the government and would have salaries paid without annual appropriations, and be able to do so successfully. The result of these permanent annual appropriations is that more than half of the current expenses of the government, exclusive of pensions and salaries, are beyond the reach of any particular Congress. That is, it is not necessary in

<sup>1</sup> U. S. v. Langston, 118 U. S., 389.

<sup>2</sup> See also *Antoni v. Greenhow*, 107 U. S., 769, in which it is said that the declaration by the legislature that money shall be spent is an appropriation by law.

order that these expenses be paid that there be any action on the part of Congress at all. The failure of Congress to act or to agree with the President will not affect the action of the administration in the carrying on of the government through the payment of a large part of the expenses. The particular expenses of the government which are under the control of each Congress are, those of the army, the navy, and of the other branches of the administration with the exception of the customs. Congress has never, as has the English House of Commons, divested itself of the right to make appropriations other than those proposed by the administration. Indeed in practice many of the most unwise appropriations of the national government are made on the proposition of Congress and not on that of the administration. Congress further always makes use of its undoubted right to cut down or amend in some way the estimates sent in by the administration. It has also attempted, by tacking to appropriations provisions objectionable to the administration, to force their acceptance by it, under a threat of a refusal of the estimates, but the determined stand recently made by one of the Presidents and the absolute impossibility of refusing important appropriations to the administration have finally convinced the Congress that this is not a proper use of its control over the finances.

When we come to the control of the commonwealth legislatures over the expenses we find such a variety of systems that it is impossible to say what is the general rule. In some commonwealths we find that the amount of the appropriations is fixed almost altogether by the administration in accordance with general

and permanent laws over which a given legislature has practically little control<sup>1</sup>; and it has been held that without any special appropriation the payment of salaries fixed by permanent law may be enforced by *mandamus*.<sup>2</sup> In other and indeed in most cases most of the appropriations are made annually or biennially by the legislature.<sup>3</sup> In all the commonwealths the legislature has the power to make appropriations other than those proposed by the administration if the administration is to submit estimates to the legislature. Generally also the legislature, where such estimates are submitted to it, has the right to cut them down and often exercises this power. But as a result of the very general power of the governor to veto items in appropriation bills<sup>4</sup> the legislature may not force the administration to take action not approved by it as a result of tacking such a provision to an appropriation bill.

In France the legislature has just as complete a control over the expenses as over the receipts. It may also and does as a matter of fact, make appropriations, estimates for which are not presented by the administration, to the great detriment of the budget, and has the right, which it not unfrequently exercises, to cut down the estimates as presented.<sup>5</sup>

The exact control which the legislature has over the

<sup>1</sup> The courts seem to regard this practice as perfectly proper. See *People v. Supervisors*, 17 Hill N. Y., 195; *John J. Townsend, trustee, v. Mayor, etc.*, 77 N. Y., 542.

<sup>2</sup> *Nichols v. Comptroller*, 4 Stew. and Port. Ala., 154.

<sup>3</sup> In some cases this is required by the Constitution, *Stimson, op. cit.*, p. 320 B. This is so in Arkansas, Kansas, Louisiana, Missouri, Ohio, and Texas.

<sup>4</sup> *Supra*, I., p. 75.

<sup>5</sup> *Ducrocq, op. cit.*, I., 533-544. Cf. also Leroy Beaulieu, *Science des Finances*, chapter on *Le Vote du Budget*.

expenses in the German Empire does not seem to have been fixed. There is even at the present time a struggle going on between the believers in what is known as French liberalism and those who feel that the existence of a strong administration requires that a large part of the expenses should be independent of the yearly action of the legislature. So far the result is that while some of the expenses are based on permanent law and while others are fixed for a term of years, by far the larger part of the expenses are in the control of the legislature whose annual action is necessary in order that they be paid. It must, however, be remembered that a large part of the expenses of the imperial administration are defrayed by the members of the empire. Such is the case *e. g.* with the expenses of collecting the customs duties and the internal revenue. For the separate members of the empire pay, in their matricular contributions only the net income of these taxes.<sup>1</sup> Among the expenses of the imperial government which have been fixed by permanent law are the interest on the imperial debt, the expenses of all institutions and authorities which owe their establishment to permanent law, *i. e.* the salaries of all officers having permanent positions, since judgments against the treasury obtained in the ordinary courts by them for their salaries have to be paid.<sup>2</sup> The main expense which is fixed for a term of years is the expense of the army, one of the largest items of the imperial budget. The German practice on this matter has varied considerably. But the latest settlement of the question would seem to be that the expenses of the army shall be fixed for a period of seven years. The reason why it has seemed

<sup>1</sup> Meyer, *Deutsches Staatsrecht*, 546.

<sup>2</sup> Meyer, *op. cit.*, 549.

necessary to give to the army expenses a more permanent character than is possessed by most of the expenses of the administration, while most of the countries, which have adopted most fully the idea of permanent appropriations, have left the legislature a large control over the army expenses, is to be found in the geographical position of the German Empire. Germany has almost no natural boundaries to the east and west and on both of these frontiers lie hostile states ready to take any advantage of the least symptom of weakness. A strong administration of military affairs is therefore absolutely necessary. This is accomplished by this arrangement, which is known as the *septennate*. For during the periods for which the estimates are voted the legislature has practically no control over the military administration. The privilege granted to the presiding state of the empire, *viz.*, Prussia, which means practically the Emperor, to veto any proposition amending the laws regarding the army, gives the Emperor the power to prevent the repeal or amendment of the septennate.<sup>1</sup>

In the separate members of the empire the rules with regard to the control of the legislature over the appropriations are about the same as those in force in the empire. Among the permanent expenses are to be mentioned the matricular contributions (at least over these the legislature of the particular member of the empire has no control), the civil list of the prince, and all payments to be made as a result of the application of the rules of private law inasmuch as they may be enforced by the judgments of the courts.<sup>2</sup>

An interesting question which arises in this connec-

<sup>1</sup> See Imperial Constitution, Art. 7.  
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<sup>2</sup> Meyer, *op. cit.*, 538.



tion is what is the power of the administration with regard to the payment of unforeseen expenses which arise after the voting of the appropriations and which must be made when the legislature is not in session. France and England are about the only countries that attempt to regulate this matter by law. In France it is provided that the President of the republic may, in case the legislature is not in session, enlarge the amount of any given appropriation, though it expressly forbids him to open an absolutely new appropriation. This is to be done by a decree issued after taking counsel with the Council of State and must be submitted to the legislature at the opening of its next session. England has provided a series of funds, *viz.*, the civil contingencies fund and the treasury chest fund to which the government may have recourse.<sup>1</sup> But it is said that the administration is "strictly accountable to Parliament for all such transactions and the advances so made out of these funds must be replaced out of moneys voted by Parliament for that purpose."<sup>2</sup> Further in England unexpended balances of appropriations are largely at the disposition of the administration. As the heads of the administration, the ministers, are always responsible to the Parliament, such a power is not susceptible of great abuse.<sup>4</sup>

In the other states the rule generally is that any modification made by the administration in the appropriations so as to increase the amount appropriated is made at the peril of the administration. Circumstances arise also even in states, like England and France, which make some provision for the payment of unfore-

<sup>1</sup> L. Dec. 14, 1879.

<sup>2</sup> *Ibid.*

<sup>3</sup> Todd, *op. cit.*, I., 730.

<sup>4</sup> *Ibid.*, 759.

seen expenses, when, in order that the government may go on, the appropriations must be exceeded. Such cases are not susceptible of juristic treatment. The fact simply presents itself to the administration that in order that the government may go on the law must be broken. As it is more important that the government shall go on than that the law shall be observed, the universal practice is for the administration, whether it is republican or monarchical, to break the law and then come before the legislature for an indemnity. The question is a purely political one and the action of the administration will be judged in accordance with the facts of the particular case. But it is seldom that the legislature will be unreasonable. Where the administration is dependent in tenure on the legislature the case can never be a serious one. For the result of the disapproval of the legislature will finally be the overthrow of the ministry. Where, however, the administration is independent of the legislature a more serious case may arise—a case which must be settled not by law but by politics. Similar instances of conflict may arise in case the legislature refuses to grant the appropriations. But these are as before political rather than legal questions.

### *III.—Examination of accounts.*

In order that the control which the legislature possesses over the administration through its control over the receipts and expenses may be of any value it is necessary that it have the further power of examining the accounts of the administration after the execution of the budget. In this way and in this way alone can

it satisfy itself that its directions relative to the receipts and expenses have been observed. All constitutions grant some such power to the legislature; and the usual rule is that the legislature makes use of some authority independent of the administration to aid it in the examination which it makes. This is the case in France, England, and Germany. In France it is the Court of Accounts, whose members though appointed by the President are irremovable, which examines the accounts of all administrative officers having charge of public money and property, and which thus acquires a large knowledge of the methods of action of the administration in the execution of the provisions of the budget and reports its findings to the legislature.<sup>1</sup> In Germany both in the empire and in Prussia a similarly organized body with a similar name discharges similar functions.<sup>2</sup> These bodies both in France and Germany really also exercise a judicial control over most of the actions of the administration relative to the finances. In England the comptroller and auditor general, who has the judicial tenure, examines the accounts of the officers of the administration (thus having a judicial control) and has the further power of preventing the unauthorized expenditure of money. He is also called upon to report to Parliament the results of his investigations and to aid it in its endeavor to ascertain how far the administration has observed the provisions of the appropriation acts.<sup>3</sup> In the United States, however, the legislature acts in its investigations unaided by any other authority. Great care is taken both by

<sup>1</sup> Boeuf, *Droit Administratif*, 84-102.

<sup>2</sup> Meyer, *Deutsches Staatsrecht*, 540, 551.

<sup>3</sup> Todd, *Parliamentary Government in England*, II., 569.

the national constitution and by the statutes of Congress to ensure the full publicity of the accounts of the administration, some of whose departments have to report directly to the legislature while the secretary of the treasury has to report to it in full the entire receipts and expenditures of the preceding year.<sup>1</sup> The rules of the House of Representatives have usually provided<sup>2</sup> that such accounts shall go to the speaker of the house and be submitted by him to the house for reference. They are then to be referred<sup>3</sup> to one of the eight standing committees on expenditure which shall examine them together with the manner of keeping them, the economy, justness, and correctness of the expenditures, their conformity with appropriation laws, the proper application of public moneys, the security of the government against unjust and extravagant demands, retrenchment, the enforcement of the payment of moneys due the United States, the economy and accountability of public officers, the reduction or increase of pay of officers, and the abolishment of useless offices. Each of the eight standing committees on the expenditures of the departments has one or more of these subjects within its purview and after making the necessary examinations is to report to the house. What the legislature will do in case of unauthorized expenditures or of failure to observe the provisions of the budget, the laws and the rules do not say; and it is not the habit of the house to pass any law or resolution settling and affirming the actions of the administration in case they are in conformity with the appropriation acts and releasing the officers of the government having

<sup>1</sup> Const., Art. I., sec. 9, par. 7; U. S. R. S., secs. 260, 261, 266, and 267.

<sup>2</sup> See rule 42.

<sup>3</sup> Rule 11, sec. 32.

control of the execution of the budget from all further responsibility for it. In England the action of the House of Commons is very similar. There is a committee of accounts which is to pursue the same kind of investigations, but which is aided in its work by the comptroller and auditor general.<sup>1</sup> The effect of their investigations is about the same. That is, it does not seem to be the habit of the house to take any formal action as to the release of the officers of the administration from responsibility for the execution of the budget. But in case any serious irregularities were discovered which the house felt it could not, with justice to itself, allow to pass unnoticed, the remedy would, in accordance with the general principles, be the passage of a vote of censure or of lack of confidence in the administration which might ultimately lead to the overthrow of the ministry. In France, and Germany, however, the result of the investigations of the legislatures into the conformity of the actions of the administration with the provisions of the budget always results in the passage of a law, which, if nothing serious is discovered involving the administration, releases the officers controlling the administration from all responsibility for the execution of the budget.<sup>2</sup> In France, however, this law comes so long after the execution of the budget that it really does not amount to much. Indeed the investigation by the legislature of the accounts of the administrations supervenes so long after the execution of the budget that there is plenty of time in the peculiar conditions of French politics for the existence of several separate ministries

<sup>1</sup> Gneist, *Das Englische Verwaltungsrecht*, 1884, 731.

<sup>2</sup> Ducrocq, *Droit Administratif*, I., 423 ; Meyer, *op. cit.*, 539.

before the examination is undertaken of the accounts of any particular budgetary year. If, however, it happens that the ministry whose accounts are being examined is in office at the time of the examination the result of the discovery of any unauthorized expenditures might be its fall. There is further a criminal responsibility which might be enforced before the courts even if the ministry were out of office for collecting any unauthorized taxes.<sup>1</sup> In Germany it is difficult to see what would be the result of the discovery by the legislature of a serious lack of conformity of the actions of the administration with the provisions of the budget. As the principle of parliamentary responsibility has not been adopted the result would certainly not be the retirement of the ministry so long as it was backed by the Emperor or the prince. Again though the constitution of both the empire and of Prussia would seem to recognize some responsibility of the ministers this principle has not been sufficiently developed to permit of their being impeached. Indeed the Prussian constitution was put to the test in this very matter in the great constitutional conflict over the army appropriations in 1860-64 and the result showed that this legislative control over the finances was of no value in a case of real conflict between the administration and the legislature.

<sup>1</sup> *Supra*, II., p. 278.

## CHAPTER IV.

### IMPEACHMENT.

This like the other methods of legislative control is derived from England. The method of impeachment seems to have been necessary in England because the English law did not allow a civil or criminal suit to be brought against the highest officers of state except with extreme difficulty. It was thus developed mainly to fill up a gap in the judicial control. A further reason for its development is to be found in the impossibility of obtaining a conviction of the great nobles before the ordinary courts<sup>1</sup> and in the necessity of some means of legislative control in the days when the principle of the parliamentary responsibility of the ministers had not been developed.<sup>2</sup> Since its development in England it has been adopted to some extent in almost all constitutional countries, and in some cases is made use of against not only the ministers but also all civil officers of the government.

The ordinary English method of impeachment was formed in analogy with the ordinary criminal procedure, the House of Commons taking the part of the grand jury and thus bringing forward the impeach-

<sup>1</sup> Blackstone, *Commentaries*, IV., 360.

<sup>2</sup> For its history see Cox, *Institutions of the English Government*, 229 *et seq.*, 468.

ment or indictment, the House of Lords acting as the court.<sup>1</sup> The grounds for impeachment were originally abuse of office from corrupt, partial, or oppressive motives, violation of the law, and treason, which was usually defined by the court of impeachment to suit itself, and depended very much upon its feeling towards the accused,<sup>2</sup> but later came to include, especially during the reigns of the Stuarts, offences political in nature.<sup>3</sup> The punishment originally was death, banishment, fine, or imprisonment in the discretion of the court of impeachment. Soon after this method was developed there grew up the habit of exercising this control through the ordinary process of legislation, *i. e.* by the passage of a bill of attainder in accordance with which no fair trial was granted the person attainted. This seems to have originated with the Tudors and was quite frequently employed during the constitutional struggle of the seventeenth century.<sup>4</sup> This method has, however, in practice been abandoned as it was grossly unjust. Parliament still of course has the power to pass a bill of attainder if it wishes to, although in the United States such action by Congress is forbidden by the national constitution.<sup>5</sup> The method of impeachment even, has with the development of the principle of the Parliamentary responsibility of the ministers, rather fallen into disuse, the last case being that of Warren Hastings, which occurred about the end of the last century. The other methods of legislative control are so complete that it is difficult to see in what cases it could be applied with advantage. The

<sup>1</sup> *Ibid.*, 229, 470, 471.

<sup>2</sup> Gneist, *Das Englische Verwaltungsrecht* (1884), 436.

<sup>3</sup> *Ibid.*

<sup>4</sup> Cox, *op. cit.*, 235, 465.

<sup>5</sup> Art. I., sec. 9, p. 3, sec. 10.



power still remains in Parliament and may be made use of in an extreme case where all other means of control fail to bring the administration to an observance of the laws or customs of the land.

This method of impeachment has been adopted in the United States both in the national and in the commonwealth governments. The national constitution provides that the House of Representatives shall have the sole power to impeach the President, vice-president and all civil officers of the United States<sup>1</sup>; that the Senate shall, with the chief justice of the United States as presiding officer in case the President is impeached, have the sole power to try impeachments and shall convict only as a result of a two-thirds vote of the members present<sup>2</sup>; and that the punishment in case of conviction shall be removal from office and disqualification to hold any office of honor, trust, or profit under the United States in the future, with the impossibility of pardon, but that the person so convicted shall be liable to indictment, trial, judgment, and punishment according to law.<sup>3</sup> The causes of impeachment are<sup>4</sup> treason, bribery, and other high crimes and misdemeanors. There have been two views as to the meaning of this phrase. One is that the only cause for impeachment is a crime, *i. e.* an act for which a person may be indicted and punished in accordance with the law; the other assigns a much wider meaning to the phrase and claims that the phrase was purposely left vague at the time of the formation of the constitution so that it might by construction be made to include political offences. The cases in which the article in

<sup>1</sup> Art. I., sec. 2, p. 5; art. II., sec. 4.

<sup>2</sup> Art. I., sec. 3, p. 6.

<sup>3</sup> Art. I., sec. 3, p. 7.

<sup>4</sup> Art. III., sec. 4.

the constitution relative to the causes of impeachment has been construed are few in number and some of them have been decided for jurisdictional reasons and are therefore of little value in throwing light on the meaning of the article. Thus the first case, *viz.*, that of Senator Blount, decided that a Senator of the United States could not be impeached inasmuch as he was not a civil officer of the United States in the meaning of the constitution, while the last case, *viz.*, that of a cabinet officer was decided largely on the ground that, as such officer had resigned and his resignation had been accepted by the President, he was not subject to the jurisdiction of the impeachment court. The only cases in which the person impeached has been convicted are those of Judge Pickering, who was convicted of offences distinctly not political; Judge Humphreys, who was convicted of treason in the beginning of the war, his treasonable acts being the making of a speech in favor of secession and acceptance of the office of judge in the southern confederacy. On the other hand Judge Chase, who was impeached for "highly indecent and extra judicial" reflections upon the government of the United States made to a grand jury during the time when the alien and sedition laws were in force; President Johnson, who was impeached for a political offence which had been made a high crime and misdemeanor by act of Congress; and Judge Peck, who was impeached for arbitrary conduct in committing for contempt of court an attorney who had published a criticism of one of his opinions, were all of them acquitted.<sup>1</sup> It would seem therefore that the phrase "high crimes

<sup>1</sup> See *Cyclopedia of Political Science, etc.*, *sub verbo* Impeachment. Article by Alexander Johnston.

and misdemeanors " does not include political matters. This is largely due to the fact of the large majority which is required for conviction in the court of impeachment. For in the case of an impeachment for an act of a political character party feelings will be arrayed against each other, and in the state of political parties in the United States it will be very unusual for any party to have such complete control of the court of impeachments as to be able to get the requisite two-thirds majority.

The constitutions of most of the commonwealths recognize the right in the legislature to impeach and convict the officers of the government but the provisions differ somewhat in their details. One constitution, *viz.*, that of Oregon, expressly forbids impeachment. The majority of the constitutions provide for the impeachment of all civil officers. Some expressly refer to the governor.<sup>1</sup> The cause for impeachment in most of the constitutions is crime, but some provide that immorality, official corruption, or misconduct and even incompetence, incapacity, or neglect of official duty, and favoritism will be sufficient cause.<sup>2</sup> All the commonwealths in which provision is made for impeachment, with the exception of Nebraska, provide that the lower house of the legislature is to initiate the impeachment generally as a result of a majority vote. In Nebraska the impeachment is to be initiated by the legislature in joint assembly of the two houses. In all but two commonwealths the impeachment is to be tried by the senate, a vote by two-thirds of whose members or two-thirds of whose members present, being usually

<sup>1</sup> Stimson, *American Statute Law*, 63.

<sup>2</sup> So in Louisiana, West Virginia, Virginia, and Florida. See *Ibid.*, 64.

necessary for conviction. In New York, however, the judges of the court of appeals, the highest court, are joined with the senate and together with it form the court of impeachment, while in Nebraska the supreme court is the court of impeachment.<sup>1</sup> The effect of conviction is in almost all cases removal from office and in most cases also disqualification to hold office. But generally persons impeached may be at the same time indicted and punished in the usual way.<sup>2</sup>

In France as in England the adoption of the principle of the parliamentary responsibility of the ministers has made impeachment almost unnecessary. Still one of the constitutional laws<sup>3</sup> provides that the President, who is responsible to the legislature only for treason,<sup>4</sup> may be impeached only by the Chamber of Deputies and can be judged only by the Senate, and that the ministers, who are individually responsible to the legislature for their personal acts and solidly responsible for their general policy,<sup>5</sup> may be impeached for crimes committed in the exercise of their functions and tried in the same way. Finally the President may constitute the Senate into a high court of justice to judge all attempts against the safety of the state.<sup>6</sup>

While the responsibility of the ministers in Prussia and of the chancellor in the empire is recognized in the constitutions of both Prussia and the German Empire no law has been passed by either government which regulates the matter sufficiently in detail to permit an impeachment trial.<sup>7</sup> In most of the other members of the empire, however, provision is made

<sup>1</sup> *Ibid.*

<sup>2</sup> *Ibid.*, p. 65.

<sup>3</sup> L. July 16, 1875, art. 12.

<sup>4</sup> L. Feb. 25, 1875, art. 6.

<sup>5</sup> L. Feb. 25, 1875, art. 6.

<sup>6</sup> L. July 16, 1875, art. 12.

<sup>7</sup> Meyer, *Deutsches Staatsrecht*, 476 ; 480, 481.

for impeachment. As a general thing only ministers may be impeached as in France. The causes for impeachment are generally the commission of crimes and the violation of the constitution. The impeachment is, where there are two houses, undertaken by either house of the legislature or by a concurrent resolution of the two houses. The court is either the highest judicial court or a special court composed for the most part, of judges, one half of whom are chosen by the prince, one half by the legislature. Punishment on conviction is generally as in the United States, removal from office and disqualification for office in the future.<sup>1</sup>

<sup>1</sup> *Ibid.*, 474 *et seq.*

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